

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

BUREAU OF CONSUMER FINANCIAL)
PROTECTION,)
)
Plaintiff,)
)
vs.)
)
PROGREXION MARKETING, INC.; PGX)
HOLDINGS, INC.; PROGREXION TELE-)
SERVICES, INC.; EFOLKS, LLC; CREDIT-)
REPAIR.COM, INC.; and JOHN C. HEATH,)
ATTORNEY AT LAW, PC, D/B/A HEATH)
P.C.,)
)
Defendants.)
_____)

Case No.
2:19-CV-298-BSJ

BEFORE THE HONORABLE BRUCE S. JENKINS

August 9, 2022

Motions Hearing

Transcript of Proceedings

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1 SALT LAKE CITY, UTAH; TUESDAY, AUGUST 9, 2022; 10:00 A.M.

2 PROCEEDINGS

3 THE COURT: Good morning. It looks like we're all
4 here. Let's go ahead in the Bureau of Consumer Financial
5 Protection vs. Progrexion and others. It's 19-C-298,
6 calendared for a series of motions.

7 And for the benefit of the record, if you will be
8 kind enough to make a record. Again, counsel, make your
9 appearances for the record, tell us who you are and whom you
10 represent.

11 MS. McOWEN: Good morning, Your Honor. This is
12 Maureen McOwen representing the Bureau of Consumer Financial
13 Protection, and I will let my colleagues introduce
14 themselves as well.

15 MS. HILMER: Good morning, Your Honor. Tracy
16 Hilmer for the Bureau.

17 MS. FERRARA: Good morning, Your Honor. Alicia
18 Ferrara for the Bureau.

19 MR. McCONKIE: Good morning. Taylor McConkie,
20 also for the Bureau.

21 MR. REISCHL: Good morning. Jonathan Reischl, for
22 the Bureau.

23 THE COURT: Is that everybody on that side?

24 MS. McOWEN: Yes, Your Honor. Thank you.

25 MR. BENNETT: Good morning, Your Honor. Ted

1 Bennett, from Williams & Connolly, on behalf of the
2 defendants. I've got a number of my colleagues here who I
3 will introduce because some of them don't have access to
4 microphones where they are sitting.

5 My colleague Shauna Kramer, also of Williams &
6 Connolly.

7 Suzanne Salgado, also of our firm.

8 THE COURT: I'm sorry. I didn't pick up the first
9 name.

10 MR. BENNETT: Suzanne.

11 Edward Barnidge. Paul Hoversten. Emma Nino.
12 Daniel Whiteley. Loryn Helfmann. Atticus DeProspo. And
13 our co-counsel, Karra Porter.

14 And because of the array of motions that are on
15 the docket, you may be hearing from many of those attorneys
16 today, Your Honor. And they will reintroduce themselves
17 when they take the podium.

18 THE COURT: Okay. We could have a bar convention
19 at the same time.

20 To begin with, in reference to the motion to
21 amend, I'm going to grant the motion to amend the complaint.
22 It's obvious when you look at the history of this case that
23 nobody has been astonished or surprised that the subject
24 matter has been examined on both sides, including the scope.

25 So I'll ask the United States to prepare and

1 submit a suggested form of order in reference to the motion
2 to amend, and we'll grant the same.

3 Let's start with the motion to exclude the expert
4 report and testimony of John Ulzheimer, and we'll be happy
5 to move ahead on that.

6 MR. BENNETT: Thank you, Your Honor. Ted Bennett
7 on behalf of the defendants.

8 We emailed the government last night. We're
9 actually withdrawing Mr. Ulzheimer. So he won't be called
10 at trial by us. That probably obviates that motion.

11 THE COURT: Gee, thanks.

12 MR. BENNETT: Sorry, Your Honor. It was a late
13 made decision in light of the examining the other evidence
14 that the government has put on its exhibit list and the list
15 of witnesses. It makes sense not to add yet another
16 witness.

17 THE COURT: Well, I enjoyed reading his report,
18 though it took a long time.

19 MR. BENNETT: I apologize for that, Your Honor.

20 On the motion to amend, we'll file a responsive
21 pleading. Is 14 days sufficient for the Court?

22 THE COURT: I'm sorry?

23 MR. BENNETT: We'll file a responsive pleading to
24 the new amended complaint, and I just was asking if we could
25 have 14 days for that.

1 THE COURT: That's fine with me.

2 MR. BENNETT: Thank you, Your Honor.

3 THE COURT: The response should be fairly simple,
4 noting the history of this case and the 16 lawyers that have
5 been appearing for the defendant, six for the United States.
6 You'll have adequate help.

7 MR. BENNETT: Yes, we do, Your Honor. Thank you.

8 THE COURT: Okay. Let's take a look at the motion
9 to exclude the expert report of John DelPonti, Jr. and
10 related testimony.

11 Again, if you'll be good enough, for the record,
12 tell us again who you are so that we can keep track of you.

13 MS. HILMER: Yes. Good morning, Your Honor. I'm
14 Tracy Hilmer for the Bureau.

15 Your Honor, we also understand, from an email we
16 received from defendants last evening, that defendants have
17 withdrawn all but one category of opinions by Mr. DelPonti.
18 I'll let them confirm that, but our understanding is that
19 they have withdrawn Mr. DelPonti's cash flow analysis, which
20 was his first opinion, the testimony about the credit
21 reporting environment, and about credit repair generally.

22 THE COURT: Is that correct? Are they withdrawn
23 as well?

24 MR. BENNETT: Yes, Your Honor. We have withdrawn
25 his opinions regarding the overview of the credit reporting

1 industry. That will come in through fact witnesses. We
2 don't need to call an expert for that. And then the
3 testimony about the effect of this case would have on the
4 business for the government to prevail.

5 THE COURT: What remains of his proffer?

6 MR. BENNETT: So what remains of Mr. DelPonti,
7 Your Honor, is his consumer data analysis -- consumer data
8 analysis which responds to the expert report of the
9 government's expert, Dr. Frederick. Mr. DelPonti is one of
10 the four experts that respond to Dr. Frederick, given the
11 breadth of Dr. Frederick's anticipated testimony. I think
12 that's the principal opinion that remains. Yes, Your Honor.

13 So he exists merely to respond to that part of
14 Dr. Frederick's testimony. If Dr. Frederick is allowed, we
15 would call Mr. DelPonti to respond, similar with Dr. Wind
16 and Dr. Maronick.

17 THE COURT: Well, you're talking about rebuttal?

18 MR. BENNETT: Yes, Your Honor. All of those,
19 Dr. Wind, Dr. Barnett, Dr. Maronick, and Mr. DelPonti, all
20 respond to Dr. Frederick, the government's expert. So they
21 are kind of pendant to his report. So depending on how
22 much, if any, of Dr. Frederick comes into the case, we will
23 adjust accordingly with those four experts.

24 THE COURT: Do you contemplate those as rebuttal?

25 MR. BENNETT: They would be responsive in our case

1 to him. So yes, to rebut Dr. Frederick, which is --

2 THE COURT: They're not part of your case in
3 chief?

4 MR. BENNETT: As defendant, I always have a
5 struggle with that, Your Honor. We intend to make their
6 points in our principal case. We've got one case as the
7 defendant. We don't anticipate being able to --

8 THE COURT: Are they part of your case in chief?

9 MR. BENNETT: They will not be part of our case in
10 chief.

11 THE COURT: Talking rebuttal?

12 MR. BENNETT: They will rebut Dr. Frederick. So
13 if Dr. Frederick is stricken or limited in some way, all of
14 or some of those experts won't appear. In that way, it may
15 make sense to talk about Dr. Frederick first because the
16 result of the discussion of Dr. Frederick will affect Dr.
17 Maronick, Dr. Wind, Dr. Barnett, and Mr. DelPonti.

18 THE COURT: Well, let's talk about Dr. Frederick.

19 MS. HILMER: Your Honor, if I might, I'm not
20 completely clear on what defendants are still offering -- or
21 potentially offering Mr. DelPonti for.

22 THE COURT: They want to see what Frederick has to
23 say, as I understand it.

24 MS. HILMER: Okay. Would you like to handle that
25 by a proffer first, Your Honor, about Dr. Frederick or --

1 THE COURT: No. No. I think we ought to move to
2 Dr. Frederick, and he apparently seems to be a pivotal
3 person here and they want to respond to Dr. Frederick.

4 MS. HILMER: Then I will take my seat until it's
5 time for me to discuss with the Court what Dr. Frederick
6 will testify about.

7 THE COURT: Okay. What we've got is a motion in
8 reference to Dr. Frederick. So let's move to that and we'll
9 strike the other two on the representation that they are
10 rebuttal.

11 MR. BENNETT: Thank you, Your Honor.

12 THE COURT: I want to just demonstrate, if I may,
13 while it's refreshing to have people withdraw things, this
14 is just one example of the motions that have been filed,
15 lots of motions, and it takes a great deal of time and
16 effort to become acquainted with motions if they're not
17 seriously filed. And I will simply offer that as a comment,
18 because not only the attorneys are involved in the case,
19 unfortunately or fortunately, the Judge is involved in the
20 case as well. If he's conscientious at all, there's a great
21 deal of time that's been expanded in dealing with matters
22 that are currently withdrawn. I'm grateful that they are.

23 MR. BENNETT: Thank you, Your Honor. We apologize
24 for that.

25 As Your Honor has apprehended in this case, we

1 have struggled mightily to understand what the government
2 alleges are the misleading statements in this case. We have
3 struggled mightily to understand which of the 50 or so
4 witnesses the government intends to call they actually will
5 call. And we have struggled mightily to understand which of
6 the 700 plus exhibits they intend to use. In that analysis,
7 Your Honor, we have done our best to try to pare things down
8 to streamline this case.

9 THE COURT: That's one reason why I continued the
10 pretrial order for discussion until mid September.

11 MR. BENNETT: Thank you, Your Honor.

12 So with respect to Dr. Frederick, the government
13 states in its opposition to our motion that Dr. Frederick,
14 quote, will assist the jury to conclude whether these sample
15 hotswaps, advertising, and scripts used to pitch the
16 defendants' credit repair services were deceptive. So they
17 say they are going to bring in Dr. Frederick, who is an
18 expert in consumer decision making, to testify about whether
19 the scripts the hotswaps used were deceptive or whether
20 their ads were deceptive.

21 The challenge for us is that Dr. Frederick
22 doesn't, in fact, do that. He doesn't help understand
23 whether the scripts or ads were deceptive.

24 What Dr. Frederick does is in the first part of
25 his testimony he presents a consumer survey that is

1 unfortunately flawed and not helpful to the trier of fact.
2 The consumer survey that he drafted was designed to be a
3 three-minute survey, a three-minute survey that he sent out
4 by email to 270 plus consumers who had come to one of the
5 defendants through a hotswap.

6 THE COURT: I thought it was 250,000.

7 MR. BENNETT: I think the initial group was 270,
8 and then there was some discussion about the emails and
9 whether the email addresses were accurate. I think the
10 precise number that he sent it out to, 270,773 email
11 addresses. And then he ultimately culled that down to
12 234,740 email addresses. So some number of those people,
13 after some additional steps in there. It's a little unclear
14 how he rationalizes the representativeness of the ultimate
15 target audience with the ultimate list.

16 THE COURT: He got a very few back.

17 MR. BENNETT: He got an infinitesimally small
18 number back. He got -- he initially said 479, but then it
19 turns out that some people answered more than once. We
20 think it's 475 unique responses.

21 THE COURT: That number was really fascinating.
22 If you sent out 250 inquiries, 250,000, or 270, whatever he
23 sent, that he gets less than 500 back.

24 MR. BENNETT: It is fascinating, Your Honor. I
25 think it's -- and it's a problem that plagues his research

1 because what he does in this survey is try to assess, you
2 know, at a high level who was happy with the services they
3 provided. And as I'll discuss, many people had erroneous
4 memories about what they had actually undertaken. Many of
5 them forgot, apparently, who they had dealt with. Many of
6 them misunderstood his questions, which he admitted were
7 ambiguous as to what it means to try to get a mortgage.

8 But at the base, if you go back, ignoring those
9 issues just for a moment, and talk about the
10 representativeness issue, it has a couple of problems. One
11 is if you think about in our society who shows up for a
12 school board meeting, for example, people are
13 self-selecting. People self-selected to this survey.
14 People self-select to go to a city council meeting or a
15 school board meeting. But people who select to show up for
16 those things, who select to go through a survey like this,
17 they're the people who have a gripe. Very few people show
18 up at the town council and say you all are doing a great
19 job.

20 And that's what you have here. You have people
21 who get an email that invites them to take a survey about
22 something, and the ones who select to do it are inevitably
23 the ones who have complaints. And we see that -- if you
24 compare this population with the track record of other
25 people who engaged Lexington and CreditRepair.com, Credit

1 Repair and Lexington send out consumer satisfaction surveys
2 internally, and these people were more likely to have
3 responded negatively than the overall population. So you
4 have this selection bias in his report.

5 Now there's a quarrel about that. The government
6 has, they think, responses to that, and he looked at some
7 data and tried to say that the 475 really do represent the
8 250,000. But one of the things he admits in his
9 testimony -- and this is a really key point that the
10 government kind of glosses over -- he admits -- and we have
11 some of his testimony on slides.

12 If we can put up slide one, Andrew, please.

13 Dr. Frederick admits, while he quarrels with us
14 about whether the 475 represent the 250,000, he admits that
15 his sample of these 475 are not representative on a hotswap
16 to hotswap basis. And that's really critical, Your Honor,
17 because the allegations in this case is that people came
18 through individual hotswaps. They saw a script or they saw
19 an ad maybe. They spoke to someone on the phone. They came
20 to Lexington Law or CreditRepair.com, and the government
21 says in that process they were misled. And he wants to --
22 according to the government, Dr. Frederick wants to help us
23 understand was this person who came in through, for example,
24 Hope, were they misled. So he sends out these surveys.

25 But he admits -- he's asked, 34 consumers

1 responded for Easy Home Ownership, and you did not assess
2 whether the 34 were representative of the overall Easy Home
3 Ownership consumer profile; is that correct? And
4 Dr. Frederick testified that's true for any of these looked
5 at individually.

6 So he admits that his survey, lumping everyone
7 together, people who came through different channels at
8 different times, saw different ads, heard different scripts,
9 he admits that lumping them all together, he doesn't have a
10 representative sample from any individual hotswap.

11 So he can't, based on his survey, and the
12 government can't, extrapolating from his survey, say that
13 OneLoanPlace, or Easy Home Ownership, or Help Renters, that
14 any of these hotswaps about whom discovery was taken, that
15 any of them, based on his survey, did anything deceptive or
16 misleading. That's a fatal flaw to his survey. He wants to
17 lump together in a case where you need to have
18 individualized proof of each channel standing on its own,
19 and he admits he can't do that.

20 Now it's interesting in the way he asked his
21 questions in his survey.

22 You can take that down. Thank you, Andrew.

23 Dr. Frederick has been an expert in one case
24 previously. It was a Federal Trade Commission case tried to
25 an administrative law judge, ultimately appealed to the

1 Sixth Circuit, which is how it comes into the federal
2 system.

3 But in this ALJ trial, he was put forward as an
4 expert on consumer decision making, which is his field. And
5 in that -- and this is the ECM BioFilms case. And in his
6 work there, he did a survey, and he got 29,000 responses
7 from consumers. And it's interesting what his survey asked.
8 His survey in that case put to those consumers the allegedly
9 deceptive language. In that case it was what does the
10 phrase biodegradable mean, and he gave them choices about
11 what they thought it meant. And the consumer selected and
12 the Court considered that testimony.

13 He didn't do that here. He didn't put to any
14 consumer, you know, I see that you came in through Easy Home
15 Ownership. Here is an ad they used. Or even putting aside
16 knowing which channel they came through, he didn't put to
17 them any language that was ever presented to any consumers
18 to assess what they thought it meant. Did they think it was
19 a promise of something? Did they think they were guaranteed
20 some result? He didn't do that at all. Instead he asked a
21 bunch of questions that simply confused consumers and didn't
22 yield what the government promised with him, which is that
23 he was going to help us understand whether people were
24 deceived.

25 And you don't have to take my word for it,

1 Your Honor. Dr. Frederick admits that the questions he put
2 to consumers were subject to multiple interpretations. For
3 example -- if you could put up slide three, Andrew.

4 So Dr. Frederick sends out this survey, and he
5 wants to impugn the business of Lexington Law and
6 CreditRepair.com based on the responses of the various
7 people who received it, putting aside representativeness for
8 a minute. And the survey questions -- and we'll look at
9 them in a moment -- they use the word try over and over,
10 were you trying to get a mortgage. Were you trying to get
11 into a hotswap. I'm sorry, into a rent-to-own home. But he
12 testified in his deposition, I agree with you that different
13 people who have different standards for what constitutes
14 trying -- different people have different standards for what
15 constitutes trying.

16 And the questioning goes on. If you responded to
17 an ad that said you were interested in a rent-to-own home,
18 does that constitute trying to get into a rent-to-own home,
19 and Dr. Frederick testified, I would say that language is
20 ambiguous and different people will make different
21 interpretations of the word. So why is this so important?

22 If you look at slide four, for example, he asks
23 about trying and gets completely nonsensical responses
24 because people have a different standard for what that
25 means. So, for example, in his three-minute survey, he

1 asked people have you ever tried to improve your credit
2 score by using a credit repair service.

3 Your Honor, we're here today and we're looking at
4 this data because each of these 250,000 people who were sent
5 the survey, each of them used CreditRepair.com or Lexington
6 Law. They used a credit repair company on their journey.
7 And yet 140 of those people, out of the 275, 140 of them
8 answered no to the question about whether they had ever used
9 a credit repair service while trying to improve their credit
10 score.

11 If you look at slide five, another question he
12 asked, did you have contact with any companies or
13 services -- any companies or services -- when you were
14 trying to get a mortgage? This question was asked only of
15 people who said they had tried to get a mortgage.
16 Sixty-five of those people said no, that they never had
17 contact with a company or service while trying to get a
18 mortgage. Clearly people didn't understand what he meant.

19 Slide six. Have you ever tried to get into a
20 rent-to-own home? 320 people out of 475, no, never tried.
21 Did you have any contact with companies while you were
22 trying to get into a rent-to-own contract? Of the people
23 who said they had tried to get into a rent-to-own home, 68
24 said they had never contacted a company when trying to do
25 so. They just didn't understand what the words meant that

1 he was using with them because he didn't ask specific enough
2 questions.

3 Let's look at slide seven just briefly.

4 He admitted he didn't do any analysis to assess
5 what people meant when they said they tried to get into a
6 hotswap. He didn't know whether they meant they did
7 anything at all other than make that one initial call.

8 Finally, slide eight, just quickly.

9 He was asked specific questions about that. He
10 doesn't know whether they did anything other than call in
11 one of the hotswaps. He doesn't know whether they made an
12 application and withdrew it. And he doesn't know whether
13 these people who he wants to blame -- now the government
14 wants to say people were unable to get a mortgage, unable to
15 get into a hotswap even though they used Lexington Law.
16 Isn't Lexington terrible. But their expert admits he
17 doesn't even know if these people even applied for a
18 mortgage, even applied for a rent-to-own home because he
19 didn't ask the right questions.

20 So we're going to be blamed, based on his
21 statistical reduction of these people's journey, with not
22 providing a valuable service when he can't testify that they
23 carried their end of the bargain of actually taking the
24 steps, filling out the application, pursuing the application
25 to achieve what he said they wanted to achieve.

1 In fact, one of his opinions, again, impugning the
2 business of Lexington and CreditRepair.com, is that only
3 eight percent of respondents who tried to get into a
4 rent-to-own home were able. That's meaningless unless you
5 know what he meant by try. It's meaningless unless you know
6 those people actually filled out the application and took
7 the other steps.

8 And, of course, and this is also endemic to all of
9 his work, it's also meaningless statistics unless you have a
10 control group, because saying that eight percent is somehow
11 a low number for people trying to get into rent-to-own,
12 well, against what? What happens if you don't engage
13 Lexington or Credit Repair? Is the number then two percent?
14 Is it ten percent? We have nothing to compare it to because
15 he simply didn't do what a scientist should do who wants to
16 stand on his opinions, like Dr. Frederick, which is give us
17 something to compare it to.

18 I'm going to talk in a minute about his data
19 reduction regarding FICO scores. It suffers the same
20 problem. He draws all sorts of conclusions about whether
21 CreditRepair.com or whether Lexington Law actually helped
22 consumers in what he calls a material way. But he has no
23 control group to say that the performance was materially
24 different based on their work with Lexington Law, their work
25 with Progrexion as opposed to any kind of a control group.

1 We talked about representativeness earlier. I
2 want to just focus back, going back to the question that the
3 government says he's going to answer, which is whether
4 people were deceived. And then he goes on in his discussion
5 of data to talk about whether people were assisted by
6 Lexington and CreditRepair.com in terms of getting actual
7 credit repair services and whether they were successful in
8 acquiring a mortgage.

9 But Dr. Frederick admits -- and he buries this in
10 a footnote in his November 22nd, 2021 -- I think it's his
11 third report of the reports he did -- he buries in a
12 footnote that he cannot testify that his 475 folks were
13 representative of other consumers' journey in terms of those
14 two key facts, whether they successfully got a mortgage and
15 whether they were satisfied with their process.

16 The government comes back on this
17 representativeness point -- they don't really respond,
18 because they can't -- to his admission that he doesn't do
19 anything that is representative of each individual hotswap
20 channel. But they say no, it's all representative of the --
21 475 represents the 250,000 because he compared four or five
22 aspects of their characteristics with the overall
23 characteristics of the 250,000 who didn't respond.

24 But he completely avoids discussing issues that
25 are really critical and we know, and the government admits,

1 affect someone's creditworthiness. He doesn't compare the
2 two groups on the basis of, for example, the employment
3 status. So we don't know whether the 475 who responded had
4 poor employment history, were unemployed at all, had no, you
5 know, prospect of employment at greater numbers as compared
6 to the 250,000. That obviously would affect their credit
7 performance, their creditworthiness. And
8 Dr. Frederick doesn't control for that.

9 He doesn't control for age, which he admits is a
10 factor that is reflected in credit scores and
11 creditworthiness. He doesn't control for the time frames in
12 which they signed up. He's got people in different time
13 periods, but he doesn't do anything to show that the time
14 periods -- so people who signed up in 2016 are
15 representative of people who signed up -- of the 250,000,
16 the portion of those who signed up in 2016.

17 He doesn't control for education. He doesn't
18 control for geography. These are all factors that can
19 affect someone's creditworthiness. He ignores them
20 completely. And without that analysis, there's no way to
21 testify in a scientific way that the 475 represent the
22 250,000 who didn't respond.

23 And it's not surprising that it's not
24 representative, because of the infinitesimal number -- and
25 Your Honor focused on this -- the infinitesimal number of

1 people who responded. We're unaware, and the government
2 hasn't pointed one out, of any case where a court accepted
3 survey evidence with such a minuscule response rate. One
4 out of 500 people took three minutes to answer these
5 questions. That is something that is just -- a court has
6 never accepted that level of response.

7 And putting on top of it, it's not a randomized
8 sample of people. It's not as if he took 250,000 and then
9 used a random number generated, for example, to select a
10 subpopulation. He put it to the respondents -- and, again,
11 this goes back to the city council meeting. He put it to
12 the respondents to decide whether or not they would respond.
13 And when you do that, you inevitably build bias into the
14 responses and get the people who may have a gripe.

15 So the bottom line on his survey -- and we'll talk
16 about his data work in a moment -- it doesn't answer the
17 question that the government poses, which is whether or not
18 the ads or the scripts were deceptive. He could have asked
19 those questions. I don't know why he didn't. But he chose
20 not to ask those questions.

21 The questions he did ask were ambiguous. It's
22 really a question of garbage in, garbage out. If you don't
23 ask questions that are easily understood and actually get to
24 the point, the results are inevitably worthless and
25 misleading.

1 And, finally, he doesn't -- he admits that his
2 method here doesn't yield a representative sample of the
3 Hope or the other hotswap customers. He just doesn't yield
4 a representative sample that would be useful for the finder
5 of fact to be able to determine were Hope, or Ascent, or any
6 of these other hotswaps ads or scripts deceptive.

7 His testimony should not go into this case. It
8 shouldn't pollute the record in this case, and we would say
9 that testimony regarding his sample should be stricken.
10 And, of course, this would obviate the need for us to call,
11 for example, Dr. Maronick, who is a former FTC employee and
12 an expert on survey taking. We would withdraw him if
13 Dr. Frederick's survey opinions were stricken.

14 Data analysis. So the second part of his report
15 is to take a larger group of 588,000 customers -- and these
16 are people who came to Lexington and CreditRepair.com
17 between March of 2016 and July of 2020. A bit of a
18 concession there, Your Honor, about the statute of
19 limitations, by the way. They only did Dr. Frederick's
20 analysis for a period that postdates the statute of
21 limitations that we argued about previously. And he does
22 this analysis to determine whether it was deceptive for the
23 HSPs to, quote, claim that Progrexion services would help
24 them attain either a loan or a mortgage. And to do this, he
25 does two steps.

1 He first takes this data regarding almost 600,000
2 consumers and he analyzes FICO scores, other criteria to
3 determine whether their FICO scores changed during their
4 tenure with Lexington Law.

5 And then he does a second step where he tries to
6 leap from the number crunching to some conclusions. We'll
7 talk about that separately because that is completely far
8 afield from his expertise, and we'll get to that in a
9 moment. Let's focus for just a moment on the number
10 crunching.

11 Now the data that Lexington Law and Progrexion
12 keep, and they keep very voluminous, detailed data about
13 clients, it's actually very helpful in understanding how
14 effective the programs that Lexington and CreditRepair
15 undertake, how effective those programs are, because they
16 are able to track how many people have removals, how many
17 trade lines are removed, what the timing of that is. And we
18 can, in many cases, compare FICO scores along the way to
19 determine whether somebody's FICO score is going up or going
20 down, or not changing at all.

21 So this is fact testimony. It's taking business
22 records and discussing -- doing the math and discussing the
23 facts that those records convey. We have, in fact, on our
24 witness list a guy named Tony Lam, who's the keeper of this
25 data. The government deposed him at length, and he crunches

1 the numbers, and he can describe for the Court and the
2 finder of fact what the numbers reveal about consumers. And
3 he can slice it however the Court or the parties want him to
4 in terms of this hotswap, and people who came in through
5 that hotswap, or what the timing was, and determine how that
6 affected people. It's fact testimony, it's not expert
7 testimony, and it's relevant to showing whether or not these
8 companies were ripping people off.

9 We don't need an expert to do it. And you can see
10 from Dr. Frederick, when you bring in an expert who wants to
11 get to a result, they can do it pretty effectively in the
12 way that, unfortunately, some experts do. So what are the
13 problems with the way he crunches the numbers?

14 So, first of all, I mentioned that Dr. Frederick
15 starts with nearly 600,000 consumers. Right off the bat he
16 starts slicing that number down. He excludes 221,000
17 consumers who didn't have FICO score data. You know,
18 because Lexington and CreditRepair don't make any promises
19 to people about what's going to happen with their FICO
20 score, there are many, many clients who don't have FICO
21 score data in their client file. Some of the programs
22 collect it -- some of the service levels collect it, some of
23 them don't. He just slices those 221, more than a third of
24 the people, onto the cutting room floor.

25 He then excludes another 172,000, because those

1 people had credit scores that -- they had credit score data,
2 but they had more than one score, but it was on the same
3 day. So they might have gotten a score from their
4 TransUnion report and a score from their Experian report,
5 and it's on the same day. So you can't tell the difference
6 between those people, if that makes sense. So he cuts those
7 people.

8 He didn't go out through the government's
9 investigatory power, or any other way, to get from the
10 credit reporting agencies what these people's FICO scores
11 would have been along their journey. He just discarded more
12 than two-thirds of the people in the population. He does
13 zero analysis about how representative the remaining 190,000
14 people are. He just moves ahead and does his analysis.

15 But even in doing that analysis, he makes three
16 choices, at least, that skew the results in the government's
17 favor. First, he relies only on the first credit score and
18 the last credit score in a person's credit file.

19 So say someone signed up in January of this year,
20 and they stayed with Lexington Law through June of this
21 year. And if they got a credit score in January when they
22 signed up and they got another credit score in May, he uses
23 those two scores. If they got another credit score in the
24 middle in April, or February, or March, he ignores that
25 completely. So we don't know what happened in the middle

1 for people. He ignores that.

2 And, really, most importantly, Your Honor, by
3 taking the last score but not getting a score from one of
4 the credit reporting agencies postdating termination, he
5 ignores the period of time after someone leaves the service
6 when the effects of the work are still playing out.

7 As Your Honor knows, the work that we do -- it's
8 described in the engagement agreement -- a huge part of that
9 work is sending out challenges to the bureaus and
10 correspondence, we call it interventions, to the furnishers.
11 And there's a process that plays out where we send that out,
12 and then maybe a few weeks later, but sometimes longer, they
13 either remove an item or they don't. Or they come back to
14 us with a letter that says I need more information, in which
15 case we have this escalation process that we've talked about
16 with Your Honor.

17 It takes some time for that to play through. And,
18 again, once the item is removed, it doesn't immediately
19 generate, oh, you have a new score. Here's your new score
20 right now. They may not get that new score for a couple of
21 weeks.

22 So if somebody signs up in January and we're
23 sending out interventions and challenges on their behalf,
24 maybe an escalation on their behalf, and they quit in June,
25 it might not be until August that they see the improvement

1 in their score. He just ignores that completely.

2 And not only does he ignore the post-engagement
3 score movement, he ignores score movement that might have
4 occurred while they were engaged. One-third of the
5 responses he got from Lexington Law clients, he used the
6 final FICO score for them. For one-third of Lexington Law
7 clients, it was more than a month before they terminated the
8 service. So these people had one, two, three -- who knows
9 how many months of additional service after the FICO score
10 that he uses as their end point.

11 For CreditRepair.com, that number is two-thirds --
12 two-thirds of the CreditRepair.com people who he wants to
13 say their score only moved X, Y, or Z amount. Two-thirds of
14 them continued with the service and he doesn't have any data
15 on what happened after that.

16 Second, he includes literally tens of thousands of
17 consumers who never paid for the service. They signed up.
18 They decided they didn't want to do it -- or maybe they
19 wanted to do it and they wanted to do it for free, because
20 as Your Honor knows, when somebody signs up, we start
21 sending out the correspondence to their furnishers. We may
22 reach out to the bureaus on their behalf. We do that for a
23 month, and then we send out a bill. A number of clients
24 never pay that bill.

25 Actually the bill goes out in the first service

1 period, which is not a month. It's five to 15 days.

2 We do the work. We send out a bill, and a lot of
3 clients don't pay it. So these are clearly people who
4 either aren't committed to the journey, they're not
5 committed to doing the stuff that they need to do to improve
6 credit score, and we coach them on that. They aren't people
7 who stay with the service, and he includes them in his
8 amount -- in the denominator of his assessment of FICO
9 scores. That skews the scores in the government's favor.

10 Lastly, this one is really kind of inexcusable,
11 the other two are as well, but this one is just glaring.
12 About one-fifth of Lexington and CreditRepair.com clients
13 are on what we call monitoring programs where they're not
14 getting the same sort of credit repair correspondence that
15 the other clients are getting. Much like, you know, other
16 services that exist. Your bank probably has a service,
17 Your Honor, like this where they'll monitor your credit.
18 You pay them ten bucks a month, or some amount, and they
19 monitor your credit.

20 Lexington and CreditRepair.com offer that, with
21 some additional services, but it's not the kind of service
22 where we're going out and sending letters and challenges on
23 these people's behalf. He includes those people.

24 So these are people for whom we are not actively
25 trying to get removals from their credit report. We're not

1 actively trying to improve their FICO score. But he
2 includes them in his denominator. Again, skewing the
3 numbers in the government's favor.

4 And as I mentioned, he doesn't use a control group
5 at all. So we have no idea -- when he wants to criticize
6 Lexington or CreditRepair.com because people's FICO scores
7 moved X amount, there's no basis to know whether that
8 criticism is valid, because if he'd used a control group, we
9 would know is that movement a lot, is that movement a
10 little. We just don't know.

11 And that lack of a control group really ties to
12 the other fatal flaw in his data analysis, and this is the
13 leap that he makes, what the Tenth Circuit in the Atherton
14 case called a too great and analytical gap that he tries to
15 fill with really just guesses and suppositions.

16 And this is the -- if Your Honor recalls from his
17 report, he has a final conclusion. And Dr. Frederick, who's
18 an expert in consumer behavior but not an expert in credit
19 repair, credit reporting, banking, lending, anything like
20 that, one of his concluding opinions is -- it's on page 46
21 of his initial report -- for Lexington Law and
22 CreditRepair.com customers obtained through the six sample
23 hotswap affiliates, credit score increases were sufficiently
24 modest to be immaterial to most customers. Credit repair --
25 sorry, credit score increases were sufficiently modest as to

1 be immaterial to most customers.

2 How does he know what's material and what's not
3 material? He doesn't. He's making a leap. He's saying I
4 can crunch the numbers -- which, again, Tony Lam can crunch
5 the numbers. I crunch the numbers. I put my thumb on the
6 scale a little bit. I come up with these numbers. And what
7 I see -- and he'll admit this -- credit scores generally
8 went up for most consumers. But he wants to say no, no, no.
9 It doesn't matter that they went up a little bit. They
10 didn't go up enough to improve their prospect of getting a
11 mortgage, getting a loan, getting into a rent-to-own home.

12 He has no basis -- no basis to make that leap,
13 because he's not an expert in lending. He's not an expert
14 in consumer finance. He's not an expert in credit repair
15 certainly, and the government just stretches him way too far
16 to make that assessment.

17 So the bottom line on his data analysis is that he
18 doesn't analyze what caused the scores for people to move.
19 He tries to denigrate the work that CreditRepair.com does
20 and that Lexington Law does by saying other factors might
21 have played into credit score movement. Because he does
22 admit the scores go up, but he wants to blame it on other
23 things. But he doesn't do any analysis of that. And he
24 can't make this leap to say that the movement in the credit
25 scores wasn't enough, it wasn't material, because he has no

1 basis to assess materiality.

2 Finally, he doesn't help us understand whether any
3 consumer was deceived by the amount that their credit score
4 went up, because he doesn't tie any of this analysis, and
5 the government doesn't tie this analysis, to a promise that
6 was made about people's FICO scores, or their removals, or
7 anything else, because those promises, as Your Honor has
8 seen, are disclaimed repeatedly in Lexington Law's
9 engagement material.

10 So those are two of the areas where Dr. Frederick
11 focuses. He has a third area that he focuses on. So if
12 Your Honor recalls, there's about 250,000 people in the
13 initial survey. Those were people who came in through the
14 rent-to-own side of the business. What he excluded from
15 that are the 300,000 plus consumers who came in through
16 OneLoanPlace, which is, as Your Honor may recall, a lending
17 facilitator. It helps people find lenders in the way there
18 are other services available online to do this, where people
19 can come on and say I want to get a personal loan, what are
20 my best bets? Bankrate.com, for example, is another service
21 that does this.

22 And his opinion regarding that is that he wanted
23 to assess whether the work that CreditRepair.com and
24 Lexington Law do actually helped people obtain a loan
25 through OneLoanPlace, and he opines that they did not help

1 people get a loan through OneLoanPlace, and that
2 OneLoanPlace's scripts were therefore deceptive.

3 Now the only script or ad he mentions in his
4 report at all is a OneLoanPlace script, and that's, I guess,
5 the basis for his opinion, which is on page 22 of his
6 report. But the foundational and fatal flaw of his
7 OneLoanPlace analysis is that the data he relies on was
8 cherry-picked by the government.

9 The government is aware, and Dr. Frederick is now
10 aware, although he wasn't aware before his deposition -- the
11 government is aware that OneLoanPlace provided to it a
12 partial list of loans that it was able to obtain for its
13 clients.

14 When asked about this list at their deposition,
15 OneLoanPlace's's corporate designees were crystal clear, the
16 list was partial. Because of the way OneLoanPlace keeps its
17 records and because of the way they interpreted the
18 government's question when it sent them discovery requests,
19 they provided a list to the government that omitted more
20 than a million loans, according to their testimony.

21 So the government has a list of about 180,000 --
22 less than 200,000 loans on it. They give that to their
23 expert and they say do your math, does it look like people
24 got loans through OneLoanPlace? And he does that math and
25 he says no, they did not. The 180 loans on there, not

1 enough, not a lot. They don't tell him that this sworn
2 testimony of OneLoanPlace is that there's a million other
3 loans. In his deposition he said I can only deal with the
4 information I received and I didn't receive that information
5 from the government. He just relied on the representations
6 of counsel. So that kills his analysis of OneLoanPlace.

7 But there's more, of course, because with
8 OneLoanPlace, like every other bit of analysis he did,
9 there's no control group. So he can't say if people came to
10 OneLoanPlace to get a loan and they engaged with Lexington
11 Law, they had a greater or lesser chance of getting a loan
12 than if they came to OneLoanPlace and they didn't engage
13 with Lexington Law. He hasn't done that analysis.

14 So the finder of fact is going to have no way to
15 know whether the percentage that he puts on -- I think it's
16 6.5 percent, whether 6.5 percent of consumers would have
17 gotten loans absent Lexington Law, whether it would have
18 been higher than that, would it have been lower than that.
19 His data just hangs in space. It has nothing to compare it
20 with.

21 So for that reason, in addition to the
22 cherry-picking of data, the OneLoanPlace opinions have no
23 place in this trial.

24 And the last thing I will say about Dr. Frederick,
25 Your Honor, unless you have questions, is just to go back to

1 where I started, which is he creates a sideshow.
2 Dr. Frederick, the only part of his testimony that has any
3 place in court would be about data reduction regarding the
4 data kept by the defendants. But as we've seen, he does
5 that data analysis in such a slanted and ham-handed way that
6 it's completely unreliable. That has no place here. At any
7 rate, it's fact testimony. There are plenty of fact
8 witnesses in this case who can do that. Everything else he
9 brings has no basis in his expertise.

10 But more to the point, the sideshow is that
11 because the government has stretched him, they've used him
12 like a Swiss Army knife, he's got tools for all these
13 different areas, that it requires us to bring in a stats
14 expert, a statistics expert in Dr. Barnett. It requires us
15 to bring in a survey expert in Dr. Maronick. It requires us
16 to have an efficacy expert, Mr. DelPonti, and a consumer
17 decision making expert like Dr. Wind.

18 If Dr. Frederick goes, we can try this case based
19 on fact witnesses, the people who lived through the
20 experience, who can testify about the documents firsthand
21 and without the spin that Dr. Frederick puts on it.

22 So unless Your Honor has any questions, that's my
23 presentation on Dr. Frederick.

24 THE COURT: Thank you.

25 MS. HILMER: Good morning, Your Honor. Tracy

1 Hilmer, again, for the Bureau.

2 Your Honor, Dr. Frederick is absolutely relevant
3 to this case. He's well qualified. He checks all the 702
4 boxes. And all of his testimony concerning his surveys and
5 his data analyses are adequately founded in facts and data.
6 They are based on reliable methods, reliably applied to the
7 facts of this case. That's who he's testing, the consumers
8 in this case. And in his work, he's particularly focused on
9 the consumers who were hotswapped by one of the relevant
10 hotswap companies.

11 So that's who he's testing. He's not testing the
12 world at large. He's not even testing, except in rebuttal
13 to Mr. DelPonti, if they offer it, he's not even testing the
14 experience of consumers who were customers of Lexington Law
15 and CreditRepair.com who were not hotswapped. He's really
16 just focused on this group.

17 And let me just go through --

18 THE COURT: Did the government interview the
19 identifying responders to the survey?

20 MS. HILMER: Dr. Frederick selected verbatim
21 responses from them in response to certain of his open-ended
22 questions.

23 THE COURT: No, no. My question is did the
24 government interview the identified persons who responded to
25 the survey?

1 MS. HILMER: We did not.

2 THE COURT: Why not?

3 MS. HILMER: Because this was Dr. Frederick's
4 survey and he determined his -- let me --

5 THE COURT: We're talking about misrepresentation.
6 We're talking about what was said in a moment in time.

7 MS. HILMER: Let me focus, Your Honor, on what the
8 survey is really directed to, because Mr. Bennett has not
9 characterized it correctly.

10 This was not a copy test. This was not
11 Dr. Frederick saying here's an ad. What does this ad say to
12 you? How do you interpret it? That's not what this was
13 about. Dr. Frederick did a survey to find out whether
14 people who came in through one of the rent-to-own hotswaps
15 got a rent-to-own house or they didn't, whether people who
16 came in through one of the mortgage companies got one or
17 they didn't.

18 THE COURT: They either went back or they didn't.
19 Did they apply?

20 MS. HILMER: Some of them may have and some of
21 them didn't. He didn't get into -- he didn't get into a
22 20-minute, you know, multi, multi, multilevel survey because
23 he wanted to make sure that he could get the answers that he
24 needed. So he kept the questions -- intentionally kept the
25 survey reasonably short so that he could get answers to the

1 questions that mattered.

2 THE COURT: How many got a house?

3 MS. HILMER: How many got a house? Let me ask my
4 colleague to bring up Plaintiff's Exhibit 547.

5 Your Honor, this is a graphic depiction of the
6 survey results. If you look at the bottom chart, that
7 addresses the question you just asked. Of the 475
8 respondents to the survey -- a sample that Dr. Frederick
9 will testify is a perfectly adequate and indeed rather large
10 sample compared to the kinds of samples that are used in
11 published journals. Of those 475 respondents, 50 reported
12 they currently hold a mortgage. So 50. 159 reported that
13 they tried to get a mortgage but did never obtain one. And
14 zero reported that they obtained a mortgage through one of
15 the sample hotswap partners.

16 So that is the question that was posed and that's
17 what was answered.

18 The top chart deals with the rent-to-own setting.
19 There, out of the 475, a total of 16 people -- 16 people out
20 of the 475, who were hotswapped by one of the rent-to-own --
21 one of the companies that were offering rent-to-own housing,
22 supposedly, only 16 of the 475 reported getting a
23 rent-to-own home contract, out of 143 who reported that they
24 tried, but didn't get one.

25 Let me rephrase that. Actually there were 143

1 besides the 16 who tried to get a rent-to-own home but
2 didn't get one.

3 So it's a simple question. And, you know,
4 Mr. Bennett critiques the question, well, could people
5 interpret differently what does it mean to try. But the
6 questions are adequate for the purpose. Maybe trying is I
7 called one of the rent-to-own hotswaps and then I got
8 transferred to Lexington Law because they told me that's
9 what I needed to do in order to get it.

10 THE COURT: I understand the process, but I'm
11 curious on the follow-through with specific people.

12 MS. HILMER: He did not do a focus group,
13 Your Honor. He did not try to pull them in and do a focus
14 group. But that's not fatal. I mean that's another thing
15 that someone could have done.

16 THE COURT: Yes. Of those the good doctor looked
17 at, did they improve their scores?

18 MS. HILMER: Of the people who he looked at in
19 general, the scores did not improve very much. Let us bring
20 up --

21 THE COURT: Well, how about the ones who were
22 successful in getting a house?

23 MS. HILMER: Of those who were successful in
24 getting a house?

25 THE COURT: Yes. Did it improve their scores?

1 MS. HILMER: I don't know that he did that level
2 of --

3 THE COURT: Well, isn't that one of the
4 interesting questions as to I couldn't get a house at this
5 point and I went to Lexington Law, or its alternative. I
6 either got an improvement in my score and I was successful
7 or I didn't get an improvement in my score and I'm still
8 successful.

9 MS. HILMER: So I think, Your Honor, that I want
10 to point the Court to the allegation that we have concerning
11 these companies. What we're saying is that this was a bait
12 and switch scheme.

13 THE COURT: I understand that. I understand that.

14 MS. HILMER: You understand that, of course,
15 Your Honor.

16 So our position is that -- and this is what
17 Dr. Frederick's work goes to. Not just survey, but his data
18 analyses, which I'll get to. We allege that the advertised
19 product or service either was not available through the
20 relevant hotswap partner and neither Progrexion nor the
21 relevant hotswap partner had a reasonable basis for
22 representing the consumers were either guaranteed or had a
23 high likelihood of getting that advertised product or
24 service.

25 THE COURT: Now I'm interested in the

1 representation. Is the representation made in the script?

2 MS. HILMER: The representations are made in the
3 script, for example, Hope. Hope says we can get anybody to
4 640 in 90 days who started out below that.

5 There are other examples in the scripts where
6 people say -- for example, Easy Home Ownership's pitch is
7 generally along the lines, and Ascent is like this too for
8 rent-to-own, it's no problem that you have a bad credit
9 score. What we do is we partner with a credit repair
10 company. So you go over to them and you work with them, and
11 then when you're ready, you come back to us and we'll get
12 you a rent-to-own home. That's the deal.

13 THE COURT: Of those that you're referred, how
14 many came back?

15 MS. HILMER: That's unknown. Lexington Law and
16 CreditRepair.com didn't track it. And that's one of the
17 things I want to point out too.

18 I actually thought I heard coming out of
19 Mr. Bennett most of my arguments for the reasons why
20 Mr. DelPonti should be excluded. But the real problem here,
21 Your Honor, is we're limited by defendants' own data.

22 So when you think about, well, what could be done
23 with this data, Mr. Bennett wants to have Mr. Lam come and
24 offer a whole bunch of unsupported opinions instead of
25 Mr. DelPonti. That's not much of a difference.

1 But, for example, let's talk about what data the
2 defendants gave us after we asked for everything. We said
3 give us everything you have. Give us all your data, and
4 they said no, we're not going to do that. What we'll give
5 you is we'll give you data for 2016 to 2020. So there's no
6 concession about the statute of limitations. That's all
7 they would give us.

8 Those data do not contain any detail about
9 specific trade lines. We asked for demographic data of the
10 kind that Mr. Bennett was criticizing Dr. Frederick for not
11 using. They didn't give it. Apparently they have it. They
12 didn't give it.

13 So we deposed Mr. Lam, who they proposed to have
14 come up and give these talks instead of Dr. Frederick, and
15 Mr. Lam gave many erroneous answers and didn't seem to know
16 that much about the data either. So the problems that they
17 are criticizing Dr. Frederick for are largely due to the
18 limitations of the data that they produced in this case.

19 They talked about some other customer -- internal
20 customer satisfaction surveys and criticized Dr. Frederick
21 for not considering those. We don't even know what those
22 are, Your Honor. We asked for all those surveys. We asked
23 for every survey they did about their services, about the
24 hotswaps, hotswap consumers. They didn't produce it.

25 So what they have, Your Honor, and you'll see it,

1 because this is an area that the parties have a dispute on
2 in terms of the exhibits, they have columns for this
3 promotor or detractor survey, and they have a score in it.
4 What is that? It's a mystery. What are the surveys? Who
5 are they given to? How do they code them? Who coded them.
6 The Court should just disregard all of that. That's an
7 attempt by the defendants to create, you know, a narrative
8 that is just not capable of being validated. So put that
9 aside.

10 Let's talk about what Dr. Frederick actually did,
11 why he's qualified to do it, and why, although not perfect,
12 although not perhaps the most detailed or lengthy survey,
13 it's not a census form, nevertheless, the survey is
14 sufficient for the purpose and focuses on the specific
15 people that we're concerned with here, the people who were
16 hotswapped by the relevant hotswap partners, Ascent, Easy
17 Home Ownership, Hope, Rent-To-Own.com, and OneLoanPlace, and
18 it tells you something. It tells you enough about what
19 their experience was. That is certainly admissible.

20 If they want to cross-examine him, that's fine.
21 They can point out that, you know, certain aspects of the
22 survey maybe they think could have been done better. But
23 the question for Rule 702 is is it enough, is it reliable
24 enough, and will it help the jury, and we say it will.

25 Let me tell you something about --

1 THE COURT: Tell me how it helps.

2 MS. HILMER: Yes. First of all, Your Honor -- if
3 I could bring up 547, again -- it answers this fundamental
4 question. When you went to look for a rent-to-own house
5 through one of these hotswaps, did you get it or didn't you?
6 When you were seeking a mortgage, did you get it or didn't
7 you? How many people got it?

8 It's not a copy test. It's an effort to just
9 determine whether people got the thing that the hotswap was
10 advertising when they signed up for credit repair.

11 THE COURT: Apparently they were turned down to
12 begin with. They were insufficient to begin with to justify
13 a referral.

14 MS. HILMER: Well, who knows? I mean if
15 somebody --

16 THE COURT: Well, if somebody doesn't need repair,
17 nobody asks to repair.

18 MS. HILMER: And that's how it starts, Your Honor.

19 I think what we would start with, for example, is
20 Easy Home Ownership. They didn't have any houses. They
21 didn't have any listings. What they would do when somebody
22 came to them looking for rent-to-own housing is they would
23 send them to Zillow, or Trulia, you know. Anybody can do
24 that. They weren't actually performing any kind of a
25 service.

1 What they were really doing is generating leads
2 and referrals to Lexington Law for credit repair. That's
3 what they were doing. But the way they did it was to hold
4 out this hope for a lot of people who were really deeply
5 subprime, really not in a good credit situation to hold out
6 this hope, you can get a house if you'll just work on your
7 credit a little bit.

8 THE COURT: Does the script say that?

9 MS. HILMER: The scripts say -- let me see if I
10 can pull one up for you.

11 First of all, can you please bring up Plaintiff's
12 Exhibit 124.

13 This is an ad from Hope, Your Honor. You may have
14 seen this before and I apologize if it's very familiar, but
15 here's what it says. Join the more than 12,000 people since
16 2003 that bought a zero down -- a home zero down that
17 started with under a 500 score. Your Honor, that is deep
18 subprime. And the 90 Day Blitz will get anybody to 640 plus
19 in 90 days. That's the kind of ad that the Hope program had
20 out there.

21 THE COURT: Okay. Now was this ad approved by
22 Lexington Law?

23 MS. HILMER: It was known to Lexington Law. The
24 ad was known to Lexington Law.

25 THE COURT: How about CreditRepair?

1 MS. HILMER: This company did not hotswap to
2 CreditRepair. The only ones that went to CreditRepair were
3 Ascent and OneLoanPlace.

4 THE COURT: Okay.

5 MS. HILMER: So that's one script -- or one ad.

6 THE COURT: How is Lexington Law knowledgeable of
7 this particular script?

8 MS. HILMER: How were they knowledgeable? Well,
9 the standard is did they know, were they recklessly -- did
10 they act in reckless disregard.

11 THE COURT: Did they know?

12 MS. HILMER: We know they knew. They commented to
13 Hope in at least one email from Ms. Blakely Hankins, who was
14 the contact person, about the 90 Day Blitz. So there is
15 evidence that they knew about it for sure.

16 And they also claimed to have a practice of
17 reviewing the advertising and the Facebook, you know,
18 offerings of their hotswap partners. So we'll get to that
19 in terms of knowledge.

20 THE COURT: Now have you got specific people who
21 saw this ad and who were referred?

22 MS. HILMER: Your Honor, I think we're going to a
23 different topic, but I'm happy to address it, Your Honor.

24 THE COURT: I'm just curious if you have a
25 specific person who saw this ad and was referred.

1 MS. HILMER: Your Honor, we intend to show that
2 this ad, which was on Facebook for years, was widely
3 disseminated and therefore seen by many people.

4 THE COURT: I'm interested if you've got a person
5 who said I saw that ad, and I believed that ad, and they
6 told me to go to Lexington Law.

7 MS. HILMER: I don't at this time. The Bureau
8 doesn't intend to offer a specific person who is going to
9 say they saw that specific ad. But this is the
10 advertising -- excuse me.

11 THE COURT: I'm sorry.

12 MS. HILMER: I wanted to hear what you were
13 saying. I apologize.

14 THE COURT: I was just wondering who was deceived.

15 MS. HILMER: Who was deceived? This is the
16 advertising Hope was doing.

17 THE COURT: I understand that. I understand that.
18 But you've got to have somebody who said I was deceived.

19 MS. HILMER: Well, Your Honor, the standards for
20 deception is we have to show that an ordinary consumer who
21 saw this ad would be misled.

22 THE COURT: I'm searching for the ordinary
23 consumer who has legs, and arms, and heads, and brains who
24 saw the ad, and who responded to the ad, and who was
25 disappointed.

1 MS. HILMER: Your Honor, we have consumers who
2 will talk about their experiences with other hotswap
3 companies. The standard that we need to meet -- you know,
4 and I believe we do have consumer complaints along these
5 lines. We have consumer complaints --

6 THE COURT: Post their ad?

7 MS. HILMER: Yes.

8 THE COURT: You have to show that somebody
9 responds to it, don't you.

10 MS. HILMER: Well, they did. We know that they
11 were transferred to Lexington Law.

12 THE COURT: They were transferred.

13 MS. HILMER: This is the advertising they were
14 doing, and it was similar on their website.

15 So if you found a Hope ad on Facebook, if it
16 popped up while you were looking at your, you know,
17 sister-in-law's new puppy, if the ad popped up, you could
18 click on it, or somebody might be searching for rent-to-own
19 homes and we'd end up on their website, and the same kind of
20 advertising is happening there. And this is what the Hope
21 program did. They transferred people to Lexington Law.

22 THE COURT: Okay. We've identified those that
23 were transferred, haven't we?

24 MS. HILMER: Excuse me, Your Honor?

25 THE COURT: The records of Lexington Law indicate

1 which persons were transferred?

2 MS. HILMER: That's correct.

3 THE COURT: And about 90 percent go by telephone,
4 as I understand it.

5 MS. HILMER: Yes, Your Honor, a large percentage.

6 THE COURT: And --

7 MS. HILMER: So the process is they would click on
8 this Facebook ad or Hope's Web page, with the same kind of
9 representations, fill out a form, and then Hope will call.
10 And we will have testimony from a witness who will talk
11 about that process. The Bureau's investigator did a call
12 and went through that process, was pitched with the blitz,
13 and then was sent to Lexington Law.

14 So we know that this is what happened. It
15 happened on their websites, it happened in their scripting,
16 and we know that people got transferred to Lexington Law.

17 And what else we know is that very, very few
18 people who heard these pitches from these different
19 rent-to-own companies ever got a house.

20 So I want to address the sample size, because I
21 think that's crucial. Dr. Frederick is not new at this.
22 He's been doing these things for many, many, many years. As
23 you'll know from reading our papers, he's a tenured
24 professor at Yale in the School of Marketing, but he teaches
25 and studies in the areas of marketing, consumer behavior, et

1 cetera.

2 THE COURT: They're all credentialed. They have
3 wonderful resumes. But I'm really interested in the
4 relevancy of what they have to tell us to see if that's
5 helpful.

6 MS. HILMER: Okay. Your Honor, I can address the
7 sample size, which Dr. Frederick is prepared to testify is,
8 you know, a large sample size by the standards of peer
9 review journals. So he can address that.

10 I'm prepared to talk about the steps he took to
11 validate the survey responses to make sure, within the
12 confines of defendants' data, that they would be willing to
13 produce to us, shows that the results are acceptably
14 representative and reliable.

15 For example, here's what he did. He checked the
16 475 participants and he determined that the hotswap
17 companies were proportionally represented in that group
18 compared to the larger group of 260,000. So, you know, it's
19 not exactly one to one, but it's proportionally
20 representative of the number of people. So you don't have
21 like some, you know, greater number proportionally of Hope
22 versus Easy Home Ownership. It's about equivalent.

23 Defendants criticize, as I alluded to earlier, the
24 comparisons he made to determine the representativeness of
25 the 475 compared to the nonrespondents. But he looked at

1 the relevant factors. Things like, you know, what was their
2 tenure? How long were they enrolled? How many removals did
3 they purportedly have according to the data? What were
4 their first and last credit scores according to the data?
5 And that's what we're interested in here.

6 So that's what he looked at and he determined that
7 that pool of respondents was quite representative of the
8 overall group and actually fared a little bit better in
9 their outcomes. So that's why --

10 THE COURT: Do they have all credit scores that
11 were improved?

12 MS. HILMER: Who, the 475?

13 The 475, I believe there is some data on that. I
14 don't have the specific data. Some people went up. Some
15 people went down. So that's kind of the -- if I could
16 show --

17 Could you bring up Plaintiff's Exhibit 470,
18 please, Amanda.

19 I'll bring up this exhibit later.

20 Essentially what happened, Your Honor, was that
21 people who started with a high score, the longer they stayed
22 in CreditRepair it tended to go down. And the people who
23 started with a very low score, the longer they stayed in
24 CreditRepair, it tended to go up. And the people in the
25 middle kind of stayed in the middle. So Dr. Frederick, who

1 has plenty of academic credentials to say this, will testify
2 that that demonstrates that there is like a regression to
3 the mean.

4 So some people's scores went up, some people's
5 scores went down, but there's no reason to say that that's
6 because, you know, of Lexington Law or CreditRepair.com's
7 work. It's just a process that happens in the -- that's an
8 observable process for this kind of activity.

9 So some people's scores went up. Some people's
10 scores went down.

11 Maybe I can bring up a different one. Maybe this
12 will be helpful.

13 Bear with me a moment, Your Honor.

14 Plaintiff's Exhibit 474.

15 This might answer your question, Your Honor. This
16 is one of Dr. Frederick's tables that he put together that
17 shows over the time period how customers' FICO scores
18 changed by affiliates. What you see is that the mean score
19 change overall in the very bottom on the second column is
20 only 4.4 points for this group. And that's not surprising.
21 Many of these people are quite deep subprime or subprime.

22 So this is showing that over their tenure and over
23 the course of the data that we have, there's not much
24 improvement. That is the basis for his statement that, you
25 know, this is a negligible difference for most people. If

1 you were already deep subprime and you saw a four-point
2 increase in your score, that's not getting you a mortgage.
3 That's not getting you a rent-to-own house, if there is one
4 available at all. So these are the results.

5 Let's take a look at Hope, for instance. You
6 asked about Hope, Your Honor. So you remember the ad said
7 that we can get anybody in 90 days across the magic number
8 of 640 who started below. The number that's achieved that
9 were only six percent. It's a very small number.

10 So I think this is really relevant to showing when
11 people were offered -- you know, when this promise of or
12 this very strong hope of getting a house, or getting a
13 rent-to-own home, or a loan was offered to these folks and
14 they sign up for credit repair believing if they just work
15 on their credit they will get there. This shows that it
16 didn't happen.

17 Let me see if I can bring up Plaintiff's Exhibit
18 456. That's the one I was trying to show you before. I
19 think you will see this as interesting. This is again,
20 Dr. Frederick's work.

21 So this is the data that shows for the hotswap
22 customers over time what's happening with their credit
23 scores. The people who are super-prime at the beginning,
24 the longer they stay, on average their scores decrease. And
25 the deep subprime people, the bottom, in red, the longer

1 they stay in, their scores increase, but they're still
2 pretty stuck in the subprime zone. These show that when
3 these offers are made, you know, you're going to get a
4 rent-to-own house, or we can get you into a rent-to-own
5 house. You just need to do a little work with your credit.
6 We'll send you over to our partners and they'll help you.
7 That's not substantiated, Your Honor. This is evidence that
8 those claims are unsubstantiated.

9 And moreover, because it comes from the
10 defendants' data, and they have talked to you about how much
11 they use their data, they knew or should have known that
12 this is exactly what's happening. This is their data. They
13 could run these numbers. They said they're going to have
14 Mr. Lam do it. Maybe he already has done it. Maybe he does
15 it routinely. Or maybe they don't do it because they don't
16 want to see this. All of that is relevant to Progrexion's
17 knowledge about whether these claims are substantiated or
18 not substantiated. So that's part of the data analysis.

19 Your Honor, I really want to make sure that I
20 address the OneLoanPlace issue. Dr. Frederick took the
21 roster of loans that OneLoanPlace produced pursuant to this
22 Court's order. He didn't cherry-pick anything. He took
23 that entire roster.

24 The Court will certainly remember that subpoena
25 enforcement action, and the Court ordered OneLoanPlace to

1 produce a roster of loans. They produced it. Dr. Frederick
2 took that roster of loans and he compared it to defendants'
3 data, the data that we've just been talking about, and he
4 identified common people from the two data sets, people
5 who -- he used customer name and ZIP code to identify
6 common -- you know, whoever in the defendants' data set got
7 a loan according to that roster.

8 What he found was that fewer than seven percent of
9 Lexington Law and CreditRepair.com customers who were
10 hotswapped by OneLoanPlace got a loan after signing up for
11 credit repair.

12 And he further found -- you'll remember, I think
13 from all of the briefing that has been done -- I know we
14 have just inundated the Court with some of this. Our
15 contention is that OneLoanPlace misled consumers about the
16 likelihood of getting a loan or a refinance on better terms.
17 They would say, you know, along the lines of we'll get you
18 an offer. It's going to be at a high interest rate. You
19 can take it if you want, but, otherwise, what we'll do is
20 we'll look to send you over to our partners at Lexington
21 Law, and they'll set you up. They will work with you on
22 your credit. And then we can look to come back and
23 refinance you at a better rate on better terms.

24 What Dr. Frederick's study shows, using the very
25 data that OneLoanPlace produced in response to this Court,

1 what it shows is that fewer than one percent of those people
2 got a second loan, or got more than one loan.

3 So he will testify that -- Dr. Frederick can
4 testify that these data suggest that being enrolled in
5 Lexington Law or CreditRepair.com services did not really
6 help consumers obtain a loan or a refinance through
7 OneLoanPlace. And that's super relevant, Your Honor, and he
8 can draw that conclusion from the data.

9 He's also going to show that based on the data and
10 his review of the data, yes, he used the first and last FICO
11 score. He needed to do that. If you want to see a score
12 change, you have to have two. You have to have one from one
13 period of time and one from the second period of time. And
14 defendants' data, again, they have what they have. They
15 don't have all of the score data. And apparently, for
16 whatever reason, we don't know why. They were never able to
17 explain it.

18 I asked Mr. DelPonti that question. He didn't
19 know. I don't know if Mr. Lam knows why they don't have it,
20 but they don't.

21 What Dr. Frederick did was he looked at people who
22 were hotswapped, who had two scores from different dates.
23 So for the OneLoanPlace people, he found that the vast
24 majority of those customers who were hotswapped from
25 OneLoanPlace to either of the two brands did not approve

1 their score tranche. Only about one in ten did. So
2 90 percent of the people who were hotswapped didn't see a
3 score increase.

4 So he also will testify that the mean credit score
5 of that group either stayed the same or dropped. So the
6 mean scores remained. For both CreditRepair.com and
7 Lexington Law customers, who were hotswapped by
8 OneLoanPlace, they remained deeply subprime. Not likely to
9 get a better loan or get a loan on better terms when you're
10 still deeply subprime.

11 Again, this is a test, did you get what the
12 hotswaps were offering you, ultimately? And, you know, I
13 think it's this is the data we have. And Dr. Frederick has
14 been very transparent about saying what its limitations are.
15 But that doesn't mean that his whole study should be thrown
16 out. He can ask about it. That can be weighed. That goes
17 to the weight of his testimony, not whether or not it's
18 admissible.

19 So he did -- and as I showed you before with
20 Plaintiff's Exhibit 474 -- can you bring that up again,
21 please -- he did the same kind of testing with FICO scores
22 for each of the hotswap partners that we're concerned with
23 here. The bottom one -- there's a bottom one down there,
24 OwnerWiz, Your Honor, the Bureau -- I just want to make
25 clear, the Bureau is not pursuing relief or claims based on

1 OwnerWiz, and we will have Dr. Frederick take that out
2 before trial.

3 So ignoring OwnerWiz, this is the kind of study
4 that Dr. Frederick has done. And he also has looked -- he's
5 done a lot of tables. He's looked at how does the score --
6 what happens with the score based on tenure? Does it get
7 better over time by hotswap? Different breakdowns by month
8 of how scores progress.

9 So, again, to the extent that defendants' data
10 permit these sorts of studies, Dr. Frederick has done them
11 and he should be allowed to talk about them. He is somebody
12 who is an expert in consumer decision making. So it's
13 certainly proper for him to bring his expertise to bear on
14 these data, you know, and that's, I think, something that
15 also has to be borne in mind.

16 I wanted to see if there are other questions that
17 the Court has before I -- I wanted to tell you just a couple
18 of the other top line conclusions.

19 Can you bring that table back up, please.

20 So what Dr. Frederick found was overall, within
21 this population of hotswap Lexington Law customers, credit
22 scores increased by an average of just 4.4 points. But the
23 scores remained constant were declined for 45 percent of
24 customers. And the credit score tranche remained constant
25 or declined for 87 percent of customers.

1 And it's similarly dismal for the credit repair
2 side.

3 If I could have Plaintiff's Exhibit 483.

4 Again, these are people who are hotswapped by the
5 two that sent customers to CreditRepair.com. Overall FICO
6 scores increased by an average of 1.6 points, Your Honor.
7 Overall, the FICO score increased for 54 percent of
8 customers and remained unchanged or fell for 46 percent. I
9 may have gotten that wrong. Increased for 54 percent,
10 remained unchanged or fell for 46 percent.

11 Dr. Frederick also found that shifts between
12 credit tranches, moving on up and down in those credit
13 tranches, were very uncommon. So this is really helpful
14 information for the jury to understand.

15 They asked the question, well, did people get what
16 they were looking for? Did they have a reasonable chance of
17 getting that loan, or getting that refinance after -- or
18 mortgage, or rent-to-own house after they put in their time
19 and paid their money? And the answer is pretty much no.
20 And this is based on the defendants' own data, what they
21 were willing to share with us.

22 If they have other -- you know, other data that
23 they didn't produce, I think at this point it's too late to
24 start talking about it, Your Honor. They've given us what
25 they've given us, and, you know, that's what we've used. So

1 they should be precluded from complaining that they have all
2 this other data that they didn't give us, or for blaming
3 Dr. Frederick for that, because we did ask and we just
4 didn't get it.

5 I want to talk very briefly, Your Honor, just to
6 make clear, about Dr. Frederick's work.

7 Could I have Plaintiff's Exhibit 329 brought up,
8 please.

9 One of the critiques that was made, Your Honor --
10 I don't know if we can zoom in on this. This is hard to
11 read. I apologize, Your Honor.

12 One of the critiques that was made was that
13 Dr. Frederick counted people who weren't in credit repair,
14 but were only in a monitoring service. That's not true. He
15 did not count the people who were in an exclusively
16 monitoring service. But he did count people who were in a
17 lower level credit repair service. So maybe it was one that
18 only did three challenges a month instead of four or eight.
19 But he counted anybody who was getting credit repair, who
20 was being told they were getting credit repair.

21 And this is one of the defendants' chart. They
22 have a similar one for CreditRepair.com where they report
23 how many interventions you get with how many bureaus a month
24 for what price. And Dr. Frederick absolutely did not
25 include anybody who was only in a monitoring product that

1 had no interventions. So everybody that he considered was
2 supposedly getting some kind of an intervention.

3 THE COURT: How does it help us?

4 MS. HILMER: How does it help us? I think it goes
5 back to the questions that I said at the beginning. What
6 Dr. Frederick really goes to is this question, did people
7 get what the hotswaps were offering? Were they likely to
8 get what the hotswaps were offering? Those are the very
9 questions that are posed by our allegations under the
10 deception counts.

11 We say very few people. People did not -- very
12 few people -- I mean, we're talking a small amount of people
13 got a rent-to-own house or a mortgage, even though they went
14 through the hotswaps that offered those things. We are also
15 saying just look at the data. Look at the overall data from
16 defendants, defendants' own data, and take a look at it. It
17 shows that people were not very likely at all to be able to
18 qualify for those credit products that brought them to the
19 hotswap in the first place.

20 And it also, because it's defendants' data, shows
21 that they either knew or should have known. They had the
22 means to track this. There is some evidence at one point in
23 time they were interested in tracking it, but they abandoned
24 that project. And maybe the reason they did is because when
25 they started doing it, they started seeing data they didn't

1 like.

2 One thing I will point out, Your Honor, is that
3 defendants themselves, back in 2012, did a study, a survey
4 of their own customers to find out whether they got
5 rent-to-own houses when they were looking for that kind of a
6 product. The results were very similar to what
7 Dr. Frederick found. Like ten percent of the people who
8 tried to get a rent-to-own house actually ended up in one.
9 So that document is Joint Exhibit 5.

10 Maybe I can have you bring it up, Amanda. Thank
11 you.

12 Can you go to the next page so His Honor can see
13 it?

14 Lexington Law's rent-to-own analysis. So they did
15 this study -- I'm sorry, Your Honor. It's twisted.

16 Can you go to what's marked as page three. I
17 think it will be a couple more pages down.

18 I think we need to go down one more page after
19 that and then we can orient it.

20 I can give you the bottom line, Your Honor. The
21 bottom line is nine people -- nine percent of the people who
22 were looking for a rent-to-own house found one. That was
23 15. Dr. Frederick found 16. And so, you know, it's not
24 like this is an outlier. This is pretty consistent with
25 what defendants found before. Now have they done another

1 rent-to-own study? We asked. They claim privilege.

2 So I want to be clear, Your Honor, just to make
3 sure I clear this up. I don't want to give any -- leave any
4 misconception on the record. We have certain data from the
5 defendants that predates 2016 about the hotswaps, and we
6 used some of that to do our restitution calculations, but
7 that data doesn't contain FICO scores. So the data that has
8 the FICO scores is only that data that covers the period of
9 2016 to 2020. And believe me, it's not because we made some
10 concession on the statute of limitations. It's because the
11 defendants wouldn't give us more. We would have been happy
12 to take it. We would have been happy to take all of it and
13 analyze all of it, but that's all they would give us.

14 Does the Court have any more questions for me at
15 this point?

16 Okay. Your Honor, we would urge that the
17 defendants' motion to exclude Dr. Frederick be denied, and
18 that Dr. Frederick be admitted to give his testimony about
19 these matters that we have been discussing this morning.

20 There's also -- I have to say, because we're not
21 clear now where we stand after they withdrew Mr. Ulzheimer
22 and Mr. DelPonti last night, we also would like the
23 opportunity to have Dr. Frederick offer his rebuttal
24 opinions if they attempt to put up any testimony about their
25 data studies through Mr. Lam, which we obviously haven't

1 seen.

2 Thank you, Your Honor.

3 MR. BENNETT: Good morning, Your Honor. I'll try
4 to be brief. I have a number of topics to address based on
5 the government's presentation.

6 I'll start by saying I've never been in a case, I
7 don't think, where the Court's gatekeeping function, the
8 gatekeeping function that is the Court's alone has been more
9 important. And I think the government just highlighted the
10 need for the Court's gatekeeping function in some of the
11 things they said to the Court, because if Dr. Frederick's
12 testimony will be anything like the government's
13 presentation about his testimony, it will be full of
14 misleading exhibits and misleading statements about the
15 evidence.

16 I will just start where the government left off,
17 Your Honor. The government just a moment ago told the Court
18 that Mr. -- or, sorry, that Dr. Frederick excluded customers
19 on monitoring services from his analysis. At his deposition
20 he was asked the question, and when you concluded that
21 12 percent of CreditRepair.com customers increased their
22 credit tranche, do you exclude consumers who were on credit
23 monitoring? I don't believe so. Same is true for his
24 analysis of Lexington Law, he included those people.

25 And related to that Your Honor, you noticed that

1 the government --

2 THE COURT: He was unsure. I don't believe so.

3 MR. BENNETT: That's as much of a no as you'll
4 ever get from an expert, Your Honor.

5 THE COURT: Well, there it is. He says what he
6 says.

7 MR. BENNETT: The related point, Your Honor, you
8 notice the government --

9 THE COURT: Ambiguous at most.

10 MR. BENNETT: It directly conflicts with what the
11 government said a moment ago, I believe, Your Honor.

12 THE COURT: Well, I say he eliminated. He says I
13 don't believe so. Well, that gives him an opportunity to
14 say whether he did or whether he didn't.

15 MR. BENNETT: And, thus, my reference to the
16 gatekeeping function, Your Honor.

17 The related point, though, you notice the
18 government talks a lot about credit tranches, this credit
19 tranche, that credit tranche. There are five credit
20 tranches, and it's common for people to be considered in one
21 tranche or the other. But that's not something that the
22 defendants or the hotswaps focus on at all. It's something
23 the government did, because if you look at raw credit
24 scores, it's unassailable that people generally go up. The
25 tranches, there are five of them, so they're quintiles.

1 THE COURT: Do you keep track of improvement of a
2 given customer?

3 MR. BENNETT: In certain --

4 THE COURT: If I start with a FICO to begin with
5 and I'm with you for three months, do I get a new FICO
6 score?

7 MR. BENNETT: It depends, I believe, on your
8 service level. And it will also depend on the tenure, like
9 what year you were a member. And that, again, is important
10 to keep in mind, Your Honor, because the government -- we've
11 talked about this a little bit. Dr. Frederick focuses on
12 four years.

13 Now you've probably noticed, and we'll look at
14 this in a second, the ad that they talked about from Hope,
15 the Facebook posting, predates his analysis. So that
16 clearly doesn't go to his analysis whatsoever. But the
17 rent-to-own study that Lexington Law did was even in years
18 before that. That clearly doesn't go to his study. I want
19 to talk about those in just a moment.

20 I want to go back, though, to something else the
21 government said. The government said to the Court that 90
22 percent of people didn't see -- I think it was in reference
23 to the LOP consumers. Ninety percent didn't see an increase
24 in their credit score. That's a misstatement. I think it
25 was probably accidental. I think what the government meant

1 to say is that 90 percent didn't increase their credit
2 tranche. But you see the shell game with the words, they're
3 important, because credit scores, 54 percent --

4 THE COURT: Words are very, very important in this
5 case.

6 MR. BENNETT: And this is why it's so dangerous to
7 put Dr. Frederick, from Yale, on the stand to play word
8 salad with some of these important points, and he does that
9 throughout his report.

10 And if we could pull up Exhibit 456 that the
11 government showed a second ago.

12 Here is another -- in a case about deception, this
13 is one of the most deceptive things I've ever seen. There
14 are five credit tranches here, and if you look at this
15 chart, it looks like they come together. And one might
16 assume, looking at this chart from Dr. Frederick, that all
17 of these deserve equal weight.

18 What's not presented here, Your Honor, is that the
19 number of people in deep subprime is orders of magnitude
20 more than the people in super-prime. That makes sense.
21 People in super-prime are less likely to come for credit
22 repair. They've already got a rock star credit score.

23 This chart is completely misleading and would
24 mislead the jury into thinking that it's about a tie when,
25 in fact, the deep subprime people, who are the core

1 constituents of the cohort Dr. Frederick studied, they see
2 an increase, but he weights it the same as super-prime,
3 prime, and near-prime. It's completely misleading. Again,
4 a great reason for the Court to exercise its gatekeeping.

5 I was, frankly, surprised that the government
6 showed you that. I thought it was an awesome example to use
7 on cross-examination with Dr. Frederick about the misleading
8 way he presents the data.

9 I want to talk now about Exhibit 124 that the
10 government focused on for a moment. So this is a Facebook
11 ad. Your Honor can see it was posted, apparently, in
12 February of 2014, so, again, before Dr. Frederick does his,
13 you know -- before the beginning of his analysis. So,
14 again, ties not at all to Dr. Frederick. But the government
15 likes this ad.

16 They asked Joe Delfgauw, who is the head of the
17 Hope program, they asked him about this ad, and he didn't
18 seem that familiar with it. I don't think -- I think he
19 testified he wasn't familiar -- didn't remember seeing it.
20 Now the government wants to put this ad at Lexington. They
21 want to say Lexington and Progrexion were aware of this ad,
22 and they cited --

23 THE COURT: Were they?

24 MR. BENNETT: No. There's no evidence that they
25 were aware of this ad.

1 The exhibit that the government mentions but
2 didn't show is Exhibit 195 -- sorry, 095, which is an email
3 involving Blakely Hankins, who is an employee of Progrexion,
4 where she --

5 THE COURT: Progrexion furnishes scripts, do they
6 not?

7 MR. BENNETT: Progrexion furnishes language
8 dealing with Progrexion's business.

9 THE COURT: Do you furnish scripts to the
10 referrals?

11 MR. BENNETT: We furnish parts of scripts
12 referring to Lexington's business. We want to make very
13 clear that -- we want to make very sure, rather, that
14 anybody talking about our business --

15 THE COURT: And you have them furnish that to you?

16 MR. BENNETT: And we ask them to send us the
17 language --

18 THE COURT: And do you look at the language?

19 MR. BENNETT: We look at it, and we edit it.

20 And then even for things that don't concern our
21 work, if we think there is a possibility of something being
22 confusing, we ask a question about it.

23 So, here, this is just a matter of days after this
24 Facebook ad went up, and Ms. Hankins writes, I'm getting a
25 lot of reports from our agents saying they're hearing a lot

1 about your 90 Day Blitz. I know that's part of the
2 scripting and program changes you have made. I want to make
3 sure that we clarify a few things through -- clarify a few
4 things through with the 90 Day Blitz and do not set an
5 unreal expectation for clients.

6 So she is hearing about this through the call
7 center, and she reaches out to him to say, hey, we want to
8 make sure we're not setting expectations in the wrong place
9 because we don't want people to think that miracles can be
10 worked.

11 Now the 90 Day Blitz is an interesting thing.
12 Mr. Delfgaw, who again is the head of Hope, he testified at
13 length about the 90 Day Blitz. It's a multifactor program.
14 One small part of it is credit repair. There are all sorts
15 of other things that clients do to improve their credit,
16 unrelated completely to Lexington Law. It's a program that
17 he runs, he's in charge of. He testified about it. It is
18 not a Lexington Law program.

19 And so we want to make sure, as Ms. Hankins did in
20 this email, that he's not setting unreal expectations about
21 credit repair.

22 Now interestingly, in doing his survey,
23 Dr. Frederick didn't know anything about the 90 Day Blitz.
24 He didn't know what it meant. He didn't know the factors in
25 it. And yet he wants to opine to the jury that somehow

1 these ads were misleading.

2 The other thing that -- another thing that I
3 think, a few kind of word games were being played with. The
4 quarreling with the sample representativeness is not about
5 the size of the sample. One could draw a sample of 475
6 consumers that would be representative of a larger set. You
7 would have to draw it randomly and you'd have to run
8 controls for ways where it might deviate from
9 representativeness.

10 The problem with Dr. Frederick is he didn't draw
11 it randomly. And the problem with size in this is that the
12 size of -- the number of people who didn't respond so
13 grotesquely outnumbered the people who did respond. It's
14 not the raw number of 475. It's the one out of 500 with no
15 control to ensure that it's representative.

16 If we could pull up Exhibit 547, please, for a
17 moment.

18 Speaking again of the gatekeeping function, the
19 reason why we have to be assiduous about information that
20 gets presented in the case, this is an exhibit that the
21 government intends to use based on Dr. Frederick. And as
22 the government noted, the top part relates to rent-to-own
23 and the bottom part relates to mortgages.

24 Again, it goes without saying there's no control
25 here. They don't have a counterpart that shows how many of

1 these people would have gotten a rent-to-own had they taken
2 another path, or how many people would have gotten a
3 mortgage through another path. That alone is a reason not
4 to look at it.

5 But the impression, when you look at this, looking
6 at the top part, for example, of the 475 respondents, and it
7 has this large field with 475 dots in it, and a few of them
8 are colored different colors, it's completely misleading.
9 It gives the impression that all 475 people wanted to get
10 into rent-to-own, when we know from Dr. Frederick's survey
11 that about a third weren't interested in rent-to-own. They
12 were interested in mortgages.

13 So they put this up -- and I guess they intend to
14 present this to the Court or to a jury -- to give the
15 impression there was a huge number of people seeking
16 rent-to-own and only a small number did. Of course it ties
17 back to the ambiguity of what is trying? What do these
18 people do? Did they do anything other than make a call? We
19 just don't know. It's completely misleading.

20 And if you look at the bottom presentation, it's
21 even worse because many fewer people were looking for a
22 mortgage. And yet they put up all 475 dots to make it seem
23 super small, super rare that people get a mortgage. That
24 kind of misleading presentation of evidence is exactly why
25 the Court ought to keep Dr. Frederick out.

1 Now with the Court's indulgence for a moment, I
2 want to make sure I'm not missing something. I was taking
3 notes as fast as I could.

4 I don't want the Court to be left with the
5 impression that we somehow surprised the government by
6 adjusting our expert lineup in an email last evening. We've
7 been meeting and conferring with the government periodically
8 since the last time we were before Your Honor, and we have
9 been discussing with them perhaps adjusting Mr. DelPonti and
10 Mr. Ulzheimer. So those things did not come as a surprise
11 to the government.

12 I do apologize to the Court. Many, many months
13 ago these motions were filed and at that time we fully
14 intended to call them, and it wasn't until we got into the
15 deep process of trying to ascertain what case the government
16 actually intends to put on that we got to a point where we
17 were comfortable saying we don't need Mr. Ulzheimer and we
18 don't need those portions of Mr. DelPonti.

19 Finally, Your Honor, just to focus back where the
20 government started. The government started by saying
21 Mr. Frederick was going to testify about whether consumers
22 who came in through one of the hotswap companies -- the
23 people who came in through one of the hotswap companies were
24 likely to get a mortgage or likely to get a rent-to-own
25 home. That should be what he -- that is what he should have

1 done. He should have ascertained whether you came through
2 the Hope program, or whether you came through Help Renters,
3 or Ascent, whether you had a likelihood of getting what you
4 thought you had been promised.

5 But, again, he admits -- he admits that his
6 methodology does not produce a representative sample of the
7 Hope program, of Ascent, of any of the other hotswaps, that
8 it's all conglomerated together. And he claims, then, if
9 you push it all together and you ignore the different
10 business models, you ignore the different scripts, the
11 different ads, the different time frames, you can get 475 to
12 represent 250,000. We think he fails even at that level.

13 But the unassailable question -- unassailable
14 truth, rather, is that he does not have a representative
15 sample of each of the hotswaps, and that's the way the case
16 is going to be litigated. He's simply not helpful and would
17 confuse the record in this case and burn a lot of trial time
18 putting on his opinions that then require the answering
19 opinions of our experts.

20 That's all I have, Your Honor. Thank you.

21 THE COURT: Tell me just by way of information
22 more to curiosity than anything else at this point, are the
23 majority of the telephone calls that are transferred by the
24 affiliates the source of the business? That is to say are
25 those that the affiliates refer all or part of the

1 90 percent of phone calls that initiates the whole process?

2 MR. BENNETT: They are a portion and a minority
3 portion of that.

4 Most of the people who call Lexington Law do it
5 from some other source, whether it's online advertising or
6 seeing something on the website, or other media. A minority
7 of people come from hotswaps in general and a super minority
8 come from these hotswaps.

9 And then the other important thing to remember,
10 Your Honor, is that of the people who call Lexington Law,
11 whether it's hotswap people or other channels, of those
12 people, the vast majority of them get the free credit
13 consultation. And then they decide, having heard the
14 services described in the way that we talked about with the
15 engagement letter, and so forth, of what we're going to do
16 and the fact we don't guarantee outcomes, the majority of
17 them say no thank you. I'm not interested.

18 THE COURT: Tell me you've got a 1200-person bank
19 answering the telephone.

20 MR. BENNETT: Yes, Your Honor. I believe it's
21 smaller than that post COVID. But yes, it's in that frame.

22 THE COURT: Roughly, and I recognize we're talking
23 about roughly, roughly how many come from affiliates?

24 MR. BENNETT: How many of the calls come from
25 affiliates? You know I have that information but not with

1 me here. If after the break I can come back, we have a
2 pretty specific -- I want to say it's in the teens of
3 percent, but I could confirm that for Your Honor.

4 THE COURT: Okay. And the other phone calls come
5 from other sources?

6 MR. BENNETT: Other sources. If you Google credit
7 repair, you will get a page for Lexington Law that will have
8 a number, and those kinds of things -- those kinds of
9 channels are the vast majority of people who --

10 THE COURT: But the first call goes to the
11 telephone bank?

12 MR. BENNETT: The first call goes to the
13 Teleservices operator, yes, who are the Progrexion
14 employees.

15 THE COURT: Now those folks work for Progrexion?

16 MR. BENNETT: They are Progrexion employees who
17 work as agents for Lexington Law, under the supervision of
18 Lexington Law.

19 THE COURT: I understand. But they work for
20 Progrexion?

21 MR. BENNETT: Yes, Your Honor. Progrexion
22 Teleservices to be specific, as a distinction from
23 Progrexion Marketing which runs the hotswap program.

24 THE COURT: Are they paid a salary or do they work
25 on commission?

1 MR. BENNETT: They are paid a salary, and then
2 they are bonused -- and this has changed over time. But
3 they are paid a salary, and then they are bonused on
4 commission, and the formula has changed over time.

5 THE COURT: Okay. And the commission relates to
6 those that they sign up?

7 MR. BENNETT: I can confirm this, Your Honor. The
8 information I have is that the commission, for the majority
9 of the time, has related not to people who sign up but for
10 people who decide to pursue the program and pay and stay.

11 THE COURT: You sign a contract basically?

12 MR. BENNETT: And are committed enough to pay.

13 So if somebody gets on the phone and they sign the
14 contract, but then they decide, you know -- there's a couple
15 things they can do. First of all, they can cancel within
16 five days, or they can just not pay, in which case Lexington
17 doesn't send out a collection agency and they don't ding
18 their credit. They just don't pay and they disappear into
19 the night.

20 My understanding, and I will confirm this, is that
21 the Teleservices rep does not get any sort of, you know,
22 commission based on that.

23 THE COURT: I understand that. Now the telephone
24 rep takes information from the caller?

25 MR. BENNETT: Correct.

1 THE COURT: And the information received from the
2 caller ends up having the telephone rep send them a
3 contract?

4 MR. BENNETT: So they take the information from
5 the caller. They talk about their credit report summary.
6 They say you have these issues that we see here. Or they
7 ask them, really, do you know what this one is, do you know
8 what this is? People might say, oh, I recognize that one.
9 I don't recognize that. They go through this conversation.
10 Then they say here's what we do for our services. No
11 guarantees. You should keep paying your bill. All that.
12 And then ultimately --

13 THE COURT: It's the telephone operator that gets
14 the written contract?

15 MR. BENNETT: The telephone operator activates the
16 process that sends the contract, and then the contract comes
17 back, yes.

18 THE COURT: Yes. And once the contract comes
19 back, information is taken before or after, whatever. And
20 once the information is taken, you indicated the last time
21 we talked, the machines generate the response either to the
22 credit bureau or to the supplier.

23 MR. BENNETT: So that order of events is correct.
24 The letters have been pre-drafted over the last years --

25 THE COURT: I understand that.

1 MR. BENNETT: What keys the letter to go or keys
2 the challenge to go to the bureau is that algorithm that's
3 been developed over years, that is triggered by the
4 information collected at Lexington's direction by the --

5 THE COURT: And that's at the level of the
6 telephone operator?

7 MR. BENNETT: That happens subsequent to the
8 telephone operator call.

9 THE COURT: Acquiring the information?

10 MR. BENNETT: After acquiring the information,
11 correct.

12 THE COURT: And when, if any, at what time does
13 anybody talk to a lawyer?

14 MR. BENNETT: So at any time is the answer to the
15 question. At the initial take, if during intake --

16 THE COURT: No. I generate the letter. I'm the
17 telephone operator. I get the information. The
18 information, in effect, triggers the letter to the credit
19 bureau, or to the merchant. At that point in time when the
20 letters go out, they go out in the name of my name?

21 MR. BENNETT: That's correct, Your Honor.

22 THE COURT: Not your name?

23 MR. BENNETT: That's correct.

24 THE COURT: Not Lexington Law's name?

25 MR. BENNETT: Correct.

1 THE COURT: And the response comes back to my
2 address, not your address? My address?

3 MR. BENNETT: Correct.

4 THE COURT: Okay.

5 MR. BENNETT: Often -- most often, yes.

6 THE COURT: Yes. Okay.

7 Now in this process, if there are changes made, as
8 the result of the letter going out, in the credit report,
9 does the credit bureau, in response to my letter, send me a
10 new credit report or do they acknowledge the change?

11 MR. BENNETT: So they will acknowledge the change.
12 Then we at Lexington or CreditRepair.com get an
13 acknowledgment of the removal, which then is posted to the
14 portal so that the clients can see in real time, you know,
15 we sent out a letter to Acme Collection Agency. Fifteen
16 days later, that Acme trade line comes off your report. We
17 find that out. We put it on the portal. The client then
18 knows what happened.

19 THE COURT: You put it where?

20 MR. BENNETT: The client portal.

21 So every client has access, both on their phone
22 and at their computer, to real-time information about the
23 correspondence we're sending out. When we send out a
24 correspondence, you'll get a report that says today we sent
25 out questions about these trade lines. And they'll get

1 something that says --

2 THE COURT: Using my name, and the response comes
3 to my address?

4 MR. BENNETT: A response comes to your address,
5 but the change to the credit report is reported to us, the
6 removal of the trade line, and that goes on the portal.

7 THE COURT: And you post that?

8 MR. BENNETT: For the client to see. And every
9 client, as you can imagine, Your Honor, is different. Some
10 go to the portal every day. Some go much less frequently.
11 They can track what is Lexington doing for me. And then, of
12 course, they can call a paralegal or a lawyer to check in
13 and say, listen, you sent out a letter to Acme and Acme
14 didn't remove the trade line. Why not? And we can explain
15 how the process works, and either send them an email with
16 that explanation or have a live person on the phone talking
17 to them.

18 THE COURT: When I talk to the telephone operator
19 and arrange a contract, and the information that I give
20 identifies more than one dispute, one change, say I've got a
21 dozen changes, why do I deal with only two changes the first
22 letter, or three changes, or whatever? Why not deal with
23 the dozen?

24 MR. BENNETT: So that's a really great question.
25 It goes to the way the business has developed over the

1 years.

2 So because for 25 years we've been dealing with
3 literally millions of clients and tens of millions of
4 interactions with eight bureaus, and, you know, debt
5 collectors, and furnishers, and credit card companies, the
6 lawyers and the people at Progrexion understand which trade
7 lines are most likely to come off. They understand which
8 trade lines are most likely to affect your credit score.
9 And they understand what's the best way in terms of cadence
10 of communication to make that happen.

11 If we send out a blast where we send 12 disputes
12 right away to TransUnion, or to one of the other bureaus, it
13 may be less effective than dealing with them seriatim, one
14 at a time, in the best order as determined by -- and this is
15 where the work product of the lawyers plays out -- what is
16 the best way for me to advocate for my client.

17 In the same way as a lawyer preparing for trial,
18 the algorithm that the lawyers coach up is designed to make
19 the most effective arguments first, and make them in the
20 order and cadence that they should be made to get the best
21 result for the client. So that's why there's a certain
22 pace.

23 Now if clients want to pay more, they can address
24 more each month, or each service interval, and get more
25 action from the attorneys. If they want to pay less, they

1 get fewer. But the same analysis is done to make sure that
2 we're doing it in the most effective way.

3 THE COURT: Well, I'm interested in your use of
4 the word more effective. If I've got 12 possibilities, why
5 shouldn't I have 12 sent the first letter with the algorithm
6 demonstrating that I've got 12 good shots?

7 MR. BENNETT: So you haven't paid to send 12 is
8 the most likely answer to that. You've paid to send three
9 because you're in a service level that sends three.

10 THE COURT: We're talking about the number of
11 letters, then, aren't we?

12 MR. BENNETT: The number of letters and
13 communications to the bureaus. So the math is
14 interesting -- and this is all described to the clients --
15 because if you have one -- Acme Collection Agency is dunning
16 me. It's wrong. It's my brother who's a deadbeat, not me.

17 I'm making this up.

18 THE COURT: I understand that.

19 MR. BENNETT: And so --

20 THE COURT: How much difference in charge is it
21 going to be for me if I just don't want the two of them, but
22 I want 12 right now?

23 MR. BENNETT: It will be in the range of \$20 a
24 month. I can get you the exact pricing, Your Honor.

25 But the math that's interesting and important to

1 keep in mind, and as is described to the client, so Acme,
2 that's one, I'm going to send a letter to Acme. They're the
3 furnisher. It's probably, but not always, probably reported
4 on each of the three credit bureaus. So then I'm sending
5 three communications to them. So one trade line can be four
6 communications.

7 So if you have 12 -- and the math is all rough
8 because it's different in every case. If you have 12, that
9 could be 48 communications. So to determine which of those
10 to do first, we go back in 25 years of experience, millions
11 of touches, that's all programmed into the algorithm with
12 the guidance of the attorneys, by the folks who study this,
13 in the same way that we rely on experts to help us
14 understand what's the most effective way to present
15 evidence. They advocate on behalf of their client this way,
16 and the client gets to decide do I want to have all of it
17 done right now as quickly as possible or do I want to save a
18 little bit of money and have it done over time.

19 And happening, of course, all the while, because
20 people's lives go on, and this is one of the reasons -- and
21 we'll talk about this a lot at trial about FICO scores --
22 people are making choices. They're maxing out their credit
23 cards, or they're paying down debt. So there's all the
24 other factors.

25 We're focusing here on communications to the

1 bureaus and furnishers. That's only 35 percent of your
2 credit score. The other 65 percent is stuff that happens
3 outside of the letter dispute process. It's how much of
4 your credit you've used? Have you maxed your credit cards?
5 Have you taken out new loans? Do you have a long history?
6 You know, as we get older, we have more credit history. All
7 of those things can help your credit score.

8 We coach people about those, but we don't control
9 them, which is why it would be a fool's errand for us to
10 tell our clients you're going to get an X increase in your
11 score, because we can't promise that.

12 THE COURT: Well, the ad suggests that as an
13 expectation, not a promise. Otherwise you're wasting your
14 time if you don't consider modification of a particular
15 status, as of a particular credit report, as of a particular
16 moment in time. We're not just sending letters for the joy
17 of it.

18 MR. BENNETT: You're correct, Your Honor.

19 THE COURT: We expect, according to your
20 experience, that is the experience of the company, that if
21 you're correct in pointing out a defect, that somebody is
22 going to change the defect within the 30-day period
23 supposedly.

24 MR. BENNETT: We definitely have the expectation
25 that our work is going to help people improve their credit.

1 There is no question about that. So where the rubber hits
2 the road in this case, Your Honor, is whether --

3 THE COURT: If your intention is right, your FICO
4 score is going to go up as well?

5 MR. BENNETT: If you pursue the right challenges,
6 pursue the right interventions, and do the other things we
7 counsel people to do, like pay down their debts, pay off the
8 things they owe, your credit score will go up. We totally
9 expect that. But where the rubber hits the road in this
10 case is the question whether we are promising that to
11 people. And the unassailable answer to that is we are not
12 promising that to people.

13 THE COURT: Oh, no. I understand that. You make
14 that expressly --

15 MR. BENNETT: I feel strongly about it.

16 THE COURT: -- set forth in the written contract.
17 But we expect, if you're right on this incorrect entry on
18 the credit report and call that appropriately to the
19 attention of the credit bureau, while we don't promise
20 they'll do anything, we expect they will do something.

21 MR. BENNETT: And we hope they will, and they
22 should. If it's inappropriately on there, they should.
23 They don't always, but they should.

24 THE COURT: Tell me, does CreditRepair offer legal
25 services?

1 MR. BENNETT: They do not.

2 THE COURT: Okay. Does Lexington Law offer legal
3 services?

4 MR. BENNETT: Absolutely.

5 THE COURT: Are the legal services consisting of
6 the computer generated responses?

7 MR. BENNETT: In part, but not entirely.

8 So there are the letters in the letter bank,
9 drafted by the lawyers, curated by the lawyers in the
10 algorithm. That is part of what we do. That has legal
11 advice, and experience, and work product embedded in it, and
12 it has for decades -- two decades.

13 Also there's an escalation process -- we talked
14 about this briefly -- where if the creditor comes back --
15 and we've sent them a letter saying I see this trade line, I
16 don't understand it, I don't think it's mine, and they come
17 back and they say it's yours, take our word for it, and that
18 comes back. When we talk to the client or the client gets
19 that response, the client may come to us and say, no, I can
20 prove that that's not mine, or I can prove that I paid that
21 on time and I've got the receipts, well, then it goes
22 through an escalation process where the lawyers are
23 involved, the paralegals are involved, and we send another
24 request like that.

25 And then the third way is that we have lawyers who

1 are available -- Your Honor has heard this -- available for
2 calls, and they discuss it. So the legal services run the
3 gamut --

4 THE COURT: On a percentage basis, do you have
5 figures that show where the lawyer gets involved?

6 MR. BENNETT: I don't have those with me. I can
7 ask if we have that statistically. We certainly have
8 witnesses who will testify at trial about the kind of day in
9 the life of a Lexington lawyer, what it looks like, and how
10 much time they spend dealing with client issues, and how
11 much time they spend --

12 THE COURT: How about a day in the life of the
13 telephone operator?

14 MR. BENNETT: We have that as well, and we can
15 provide that. Certainly Terry Kealamakia, who runs that
16 function, can talk about that in detail.

17 THE COURT: Let's see. I'm trying to figure out,
18 with the withdrawals that we've had, the next motion, but
19 why don't I let you get some lunch, and let's start again at
20 1:30.

21 MR. BENNETT: Thank you, Your Honor.

22 MS. HILMER: Thank you, Your Honor.

23 THE COURT: We'll be in recess.

24 (Recess)

25 THE COURT: It looks like we're all here. You may

1 want to respond for a few minutes on Frederick.

2 MS. HILMER: Thank you, Your Honor.

3 I will be very brief. I just wanted to clean up a
4 few things and make some clarifications.

5 First of all, it's true that Dr. Frederick did not
6 consider any purely monitoring customers in his data
7 analysis, because people who only have monitoring, that is
8 they didn't have a product that offered any credit repair
9 whatsoever, no interventions, those people weren't in the
10 data. That wasn't provided.

11 So when there's been a suggestion that
12 Dr. Frederick didn't distinguish between credit repair
13 customers and monitoring customers, that's not true because
14 it's impossible. The data excluded the monitoring
15 customers. So everybody that was in that data had some
16 credit repair -- some credit repair products, some service
17 level of credit repair. I wanted to make sure that the
18 Court understood that.

19 Second, Mr. Bennett suggested that I may have
20 misspoken about the LOP results. So I want to be very clear
21 that what Dr. Frederick said -- or what Dr. Frederick found
22 was that for Lexington Law customers who were hotswapped
23 from OneLoanPlace and had two different FICO scores, the
24 people who got a loan after starting that -- for the people
25 who got a loan after starting, they increased their tranche

1 by -- there were about eight percent of them that increased
2 their tranche.

3 So I may have misspoken, but I want to be clear
4 that whatever misspeak I said is not what Dr. Frederick
5 said. Dr. Frederick was clear about the difference between
6 tranches and scores. So he should be allowed to clarify
7 that for himself.

8 I would also like to ask -- Amanda, would you
9 please bring up Plaintiff's Exhibit 473 for us.

10 These are the score tranches.

11 We're going to hope our system works, Your Honor.
12 It's been a little slow. So I apologize.

13 These are the score tranches -- the credit score
14 tranches that Dr. Frederick used. He used them because
15 Mr. DelPonti used them, and Mr. DelPonti was the first one
16 to issue a report on these topics. The sequence was
17 Mr. DelPonti issued his expert report in August of 2021 in
18 support of the defendants' motion for partial summary
19 judgment on Count 1.

20 And you'll recall, Your Honor, that we asked for
21 additional time to respond so we could depose those experts
22 who the defendants had disclosed.

23 Dr. Frederick did not issue his report until
24 September 27th. And so in doing so, he just used the same
25 score tranches that Mr. DelPonti had used, and that are,

1 frankly, pretty standardly accepted. You know, you'll find
2 them in CFPB reports. You'll find them on the FICO website.
3 So I just want to be clear that that's why we are using this
4 range. It shouldn't be a matter of controversy and I just
5 want to make sure it isn't.

6 Also, if I could have 456 brought back up.

7 Your Honor, this is why experts, and not lawyers,
8 should speak about mean regression. Dr. Frederick will do a
9 much better job of explaining this than I have. But I want
10 to be clear that there's no misrepresentation here.

11 The way this chart works is it shows that at each
12 point in time, say, if you look at the six-month point along
13 the bottom, and you look up, the dotted line is the average
14 starting FICO score. The solid line is the average ending
15 FICO score. And he's done that for each time period. So
16 for each time period, he's looking at the average of all the
17 people who were in for that period of time, if you will. So
18 there's not some excess weight being given to the subprime
19 group because it's all averages.

20 So I just want to be clear that this is a proper
21 chart, or at least Dr. Frederick should be allowed to talk
22 about it. And if they want to cross-examine him, have at
23 it. That's what cross-examination is for. But there's
24 nothing misleading about it.

25 And I think that's all we have for you on

1 Dr. Frederick. I just wanted to make sure that the record
2 was clear on those matters.

3 THE COURT: Thank you.

4 Are we still talking about Allen Weinberg?

5 MR. BENNETT: Yes, Your Honor.

6 THE COURT: Why don't we go ahead on Allen
7 Weinberg.

8 Now as I understand it, Dr. Wind is gone and
9 Dr. Mott is gone?

10 MR. BENNETT: I'm sorry, Your Honor?

11 THE COURT: Is Dr. Wind gone?

12 MR. BENNETT: Dr. Wind is gone only if
13 Dr. Frederick is gone. If Dr. Frederick is in, Dr. Wind is
14 still relevant.

15 THE COURT: How about Mr. Mott?

16 MR. BENNETT: He responds to --

17 THE COURT: Frederick?

18 MR. BENNETT: -- to Weinberg.

19 So Weinberg and Mott are a pair. If Weinberg
20 goes, Mott goes. And if Frederick goes, DelPonti, Barnett,
21 Maronick, and Wind go. But if Frederick is in, if Weinberg
22 is in, then Mott is in, and the other four are in.

23 THE COURT: And we're still having Victor Stango?

24 MR. BENNETT: Yes, who stands a little bit by
25 himself. He is an expert intended, really, I think,

1 Your Honor, for a remedies phase. So he might be an expert
2 that if there's a jury trial, he only would testify to the
3 Court about remedies, not to the jury about remedies,
4 depending on what the Court prefers. We could do it either
5 way. It's up to the Court.

6 THE COURT: Well, we did have a motion to exclude
7 the testimony of him.

8 MR. BENNETT: Yes, Your Honor. That's the
9 government's motion.

10 So on to Dr. Weinberg.

11 THE COURT: You go ahead.

12 MR. DePROSPO: Hi, Your Honor. My name is Atticus
13 DeProspro of Williams & Connolly. I represent the
14 defendants.

15 We seek to exclude the opinions of the
16 government's chargeback expert witness, Mr. Allen Weinberg.
17 So, Your Honor, a chargeback, or a payment dispute is a
18 debit or a credit card transaction that is reversed by a
19 cardholder's bank or credit card company after a customer
20 disputes a charge on their account.

21 The government uses an expert, Mr. Weinberg, to
22 opine that if a consumer seeks a chargeback, then it must be
23 evidence of deception or fraud in the defendants' marketing
24 and/or sales practices. And therefore Mr. Weinberg's
25 opinion is that defendants knew or should have known

1 deception was going on based on consumers seeking
2 chargebacks, and that is not true.

3 Chargebacks are irrelevant because there's no
4 causal link between chargebacks and deceptive marketing
5 and/or sales practices that the government alleges. The
6 government's use here of Mr. Weinberg is an attempt to prove
7 fraud by a proxy. Chargebacks are not evidence of deception
8 or fraud.

9 Even if chargebacks are somewhat relevant,
10 chargeback experts are repetitive, duplicative, cumulative
11 of fact witnesses. We believe that fact witnesses can
12 address any issues related to payment processing and
13 chargebacks, and therefore chargeback expert witnesses would
14 only confuse the jury and discuss matters that are
15 irrelevant to the matters before this Court.

16 Regardless, we argue that this Court should still
17 exclude Mr. Weinberg's opinions because they were
18 inadmissible. Mr. Weinberg's opinions are based on
19 unreliable methodology and insufficient facts or data.
20 Mr. Weinberg's opinion should be excluded because, first
21 off, Your Honor, he failed to consider or properly rule out
22 obvious alternative explanations for defendants' chargeback
23 rates. Mr. Weinberg's opinion is that if a client seeks a
24 chargeback, that must be evidence of deception or fraud on
25 behalf of the defendants.

1 But consider, Your Honor, for example, a customer
2 who purchases a shirt from Amazon, but after making that
3 purchase, he decides to seek a chargeback from his bank. In
4 Mr. Weinberg's expert opinion, that is evidence of deception
5 by Amazon. However, the consumer who seeks a chargeback
6 after purchasing a shirt from Amazon might do so because the
7 shirt doesn't fit, there's a tear or a stain in the shirt.
8 The consumer might not remember that they purchased the
9 shirt from Amazon when they received their credit card or
10 their bank statement that shows a charge from Amazon, or
11 they might not remember -- sorry, they might not understand
12 what the billing descriptor is on their credit card or
13 billing statement. Or it could be because the consumer
14 didn't have sufficient funds in the first place to even
15 purchase that shirt.

16 Similarly, Your Honor, Mr. Weinberg does not
17 consider obvious possible alternative explanations for
18 defendants' clients' reasons for seeking a chargeback, such
19 as the nature of the defendants' business, right? They're
20 in the telemarketing business with a subscription billing
21 model. A consumer might not understand the billing in
22 arrears requirements that are unique to the credit repair
23 space, whereas when a consumer purchases a shirt from
24 Amazon, they're charged immediately upon purchasing the
25 shirt. Whereas here, because of the regulations, a client

1 cannot get charged until we have provided those services.

2 So, Your Honor, Mr. Weinberg's opinions are
3 inadmissible because he jumps to the conclusion without
4 connecting the link as to how you get from chargeback rates
5 or evidence of deception or fraud. So we would say for this
6 reason, Mr. Weinberg's expert opinions are inadmissible.

7 Another reason that Mr. Weinberg's opinions should
8 be excluded is because he cannot opine on the defendants'
9 state of mind about whether they knew or should have known
10 that their chargeback rates were because of an alleged
11 deceptive marketing and/or sales practices as this is a
12 question for the fact finder to decide.

13 The case law in this circuit is pretty clear,
14 Your Honor, that experts may not tell the jury what result
15 to reach nor testify regarding intent, motive, or state of
16 mind. Expert evidence that simply tells the jury how to
17 rule circumvents the whole fact finder's decision making
18 function by telling it how to decide, and that is
19 inadmissible.

20 And so, again, Your Honor, Mr. Weinberg's opinion
21 should be excluded on that basis alone.

22 Another reason that Mr. Weinberg's opinions should
23 be excluded is because of unreliable methodology. He does
24 not do an apples to apples comparison. He incorrectly
25 compares defendants' chargeback rates to merchants across

1 all markets rather than merchants in the same industry,
2 which is the telemarketing card not present space. So the
3 card not present space just refers to transactions that are
4 completed via mail order, over the telephone, online, or
5 through a mobile device. This is inappropriate because it
6 fails to take into account that chargeback rates vary from
7 industry to industry.

8 So, for example, chargeback rates in the food and
9 beverage sector are lower than they are in defendants'
10 industry because consumers aren't seeking chargebacks for
11 their Starbucks coffee. And yet Mr. Weinberg compares the
12 defendants' chargeback rates to those in the food and
13 beverage industry, as well as several other industries and
14 sectors that the defendants do not operate in.

15 Additionally, Your Honor, Mr. Weinberg's
16 methodology is flawed because he inappropriately applies
17 what are called chargeback rate thresholds as a benchmark
18 for the assessment of defendants' alleged deceptive
19 marketing and/or sales practices. And the purpose of these
20 thresholds, Your Honor, is to protect the payment industry
21 in general. So it's basically to ensure that merchants
22 aren't losing thousands of dollars by having to issue
23 numerous chargebacks.

24 These thresholds are also -- that's what they're
25 used for, and they are not used to test whether a company's

1 dispute rates are too high, and they are definitely not used
2 to assess a company's marketing and/or sales practices.

3 Even if this Court were to decide that thresholds
4 were an appropriate benchmark, which we still argue they're
5 not, a more appropriate comparison here would have been to
6 compare the defendants' chargeback rates against the higher,
7 excessive thresholds that are set by the credit card
8 companies, because after a certain period of time, if you
9 operate above these higher, excessive thresholds, the credit
10 card companies will no longer permit a merchant to use their
11 form of payment to process customers' forms of payment.

12 What Mr. Weinberg here did was compare defendants'
13 chargeback rates to these lower level thresholds. And
14 that's inappropriate because even Mr. Weinberg himself
15 acknowledges that credit card networks set higher, excessive
16 thresholds, but he ignored them, we can only assume, because
17 defendants' chargeback rates never approached nor exceeded
18 these higher, excessive thresholds. But Mr. Weinberg's
19 opinions is that our chargeback rates are above average and
20 excessively high.

21 THE COURT: Are you talking about a specific
22 defendant?

23 MR. DePROSPO: When you say specific defendant, so
24 there is the Progrexion defendants, and then he also has
25 opinions as to the hotswap partners' dispute rates.

1 THE COURT: But you're not talking about Heath?

2 MR. DePROSPO: I'm sorry, Your Honor?

3 THE COURT: You're not talking about the lawyer.

4 You're only talking about --

5 MR. DePROSPO: The Progrexion defendants,

6 Your Honor.

7 THE COURT: -- the Progrexion defendants?

8 MR. DePROSPO: Yes, because it goes back to how
9 payments are processed, and payments are processed, right?
10 We have a third-party payment processor, and the Progrexion
11 entity is the one that works with the third-party payment
12 processors to process the payments on behalf of clients for
13 Lexington Law and CreditRepair.com.

14 So, Your Honor, the other thing I just want to
15 point out in terms of -- so Mr. Weinberg's opinion should be
16 excluded because of all these flawed methodologies, but then
17 he tries to attempt to fill the analytical gap between the
18 defendants' dispute rates and his conclusion that they
19 resulted from deceptive marketing practices by relying on
20 his own categorization of what are called reason codes.

21 And so reason codes are what financial
22 institutions use to explain why a customer might seek a
23 chargeback. And these vary widely from financial
24 institution to financial institution. So Visa versus
25 MasterCard versus maybe your bank here in Utah could have

1 different reasons to explain why you might seek a
2 chargeback.

3 Mr. Weinberg, what he does is he uses these reason
4 codes and he places them into buckets, and he opines that
5 certain buckets indicate the existence of deceptive
6 marketing practices. Again, this methodology is completely
7 flawed, and as the gatekeeper, we would ask Your Honor to
8 exclude his opinions on this.

9 And Mr. Weinberg himself even concedes that not
10 all of the reason codes that he categorized as reflecting
11 deception actually reflect deception. He admitted that
12 there are certain factors unrelated to deceptive marketing
13 and/or sales practices that could explain the codes he
14 labeled as like transaction not recognized or authorized,
15 that he inextricably grouped as codes representing
16 deception, but could have other reasons for it, right?

17 So, again, it goes back to those possible
18 alternative explanations that, again, a consumer might not
19 remember that they made a certain transaction or they might
20 not have recognized the billing descriptor of a certain
21 merchant on their credit card or their bank statement.

22 And Mr. Weinberg himself in previous literature,
23 and I quote, says that chargeback reason codes often do not
24 accurately reflect the actual reason the transaction is
25 being charged back since consumers and issuers often insert

1 arbitrary reasons to get the chargeback process going. And,
2 again, Your Honor, these reason codes vary considerably from
3 financial institution to financial institution.

4 So for all of these reasons, Your Honor, we would
5 ask this Court to exclude Mr. Weinberg's expert opinions
6 because they are irrelevant, chargebacks are not evidence of
7 deception. And even if chargeback rates are somehow
8 relevant, which, again, we do not think they are, chargeback
9 experts are duplicative and repetitive of fact witnesses
10 that the government has had a chance to depose and who will
11 testify at trial as to these topics.

12 THE COURT: What level of chargebacks is he
13 talking about?

14 MR. DePROSPO: When you say levels, Your Honor, do
15 you mean the excessive thresholds that I explained or the
16 lower ones?

17 THE COURT: The lower and the upper ones as well.

18 MR. DePROSPO: Sure, Your Honor.

19 In Mr. Weinberg's report, he compares our
20 chargeback rates to the major credit card companies.

21 THE COURT: What are those specifically?

22 MR. DePROSPO: What are those rates?

23 Just give me one moment, Your Honor, and I can
24 pull that up for you.

25 So, Your Honor, these have varied over time. So

1 I'm referring now to Mr. Weinberg's expert report on page
2 24. And if you look here, Visa has dispute monitoring
3 programs for the early warning, which has these lower
4 thresholds. Before October 2019, it was .75 percent. And
5 then after October 2019 onwards, they lowered it to 0.65
6 percent. Again, these are the lower early warning
7 thresholds that merchants can still --

8 THE COURT: What are the ones he's pointing to as
9 being excessive?

10 MR. DePROSPO: He doesn't point to those,
11 Your Honor. He compares defendants' dispute rates to this
12 lower early warning dispute rate instead of --

13 THE COURT: What are the relevant dispute rates
14 that he compares to the lower ones? What does he say is the
15 rate for dispute?

16 MR. DePROSPO: So, Your Honor, Mr. Weinberg
17 compares our chargeback rates to the early warning ones that
18 I just mentioned to you.

19 THE COURT: What are your chargeback rates that he
20 uses?

21 MR. DePROSPO: What does he say our chargeback
22 rates are?

23 So, Your Honor, he also refers to that here in his
24 expert report. Just give me one moment here. And obviously
25 this fluctuates over time.

1 If you look on page 37 of his expert report, he
2 provides -- sorry. Those are the ACH return rates.

3 Page 34, Your Honor, the Progrexion organization
4 chargeback rates. So he maps out on here, there's the
5 percent threshold, and then he obviously does lower ones.
6 And on four instances he points out that defendants'
7 chargeback rates exceeded the four-percent period.

8 THE COURT: I'm interested in the figures.

9 MR. DePROSPO: Yes. So, Your Honor, if --

10 THE COURT: They exceeded, but tell me the
11 figures, if you have figures.

12 MR. DePROSPO: Yes, Your Honor.

13 So here he shows -- so over a 24-month period,
14 between May of 2018 and May of 2020, if you look here, these
15 are the figures he uses, and he shows in four months out of
16 the 24 months, our chargeback rates were above one percent.

17 THE COURT: Well, I understand that. Tell me the
18 figure.

19 MR. DePROSPO: It's just above one percent,
20 Your Honor, in four months. And then the other months it's
21 less than one percent here. Those are the figures. They're
22 percentages.

23 THE COURT: But we don't have the underlying
24 figures that the percentages are based on.

25 MR. DePROSPO: Your Honor, he calculates those. I

1 don't have them handy right now in terms of the total, you
2 know, number of chargebacks that he analyzed.

3 THE COURT: What's the difference?

4 MR. DePROSPO: I'm sorry?

5 THE COURT: What's the difference between the
6 standard that he uses and your rates?

7 MR. DePROSPO: Well, Your Honor, the reason that
8 this is important is because if you're above the excessive
9 thresholds --

10 THE COURT: I understand that. What's the
11 difference? One percent, .75?

12 MR. DePROSPO: Sorry about that, Your Honor.

13 So, for example, if you look here, and, you know,
14 again, I can't see the specific number, but here in July of
15 2018, Mr. Weinberg says that Progrexion's, you know, Visa
16 card chargeback rate was just under one percent. It looks
17 like it's somewhere between .08 and .09 percent.

18 Your Honor, I'm again referring back to this page
19 24 where you look at, okay, what's the difference between
20 early warning and excessive threshold, right, and why does
21 this matter?

22 So if you're looking at this, Your Honor, if
23 you're above two percent, which is the excessive threshold
24 rate, then if you're in that category for a certain period
25 of time, eventually Visa or MasterCard won't allow a

1 merchant to use a Visa or MasterCard, you know, for a
2 merchant to process that form of payment for consumers.

3 So if you look here -- and this is Mr. Weinberg's
4 data -- none of our chargeback numbers, the actual numbers
5 themselves even come close to the two-percent excessive
6 threshold. Where mostly, if you look at this chart again,
7 Your Honor, that's in front of you, other than the four
8 instances here, most of our chargeback rates are under the
9 one-percent threshold, which is really just closer to the
10 standard program, or even early warnings, and there's not
11 any repercussions for the merchants, or defendants in this
12 case. We can still process Visa and MasterCard payments for
13 our clients.

14 And so, again, the reason that this is important
15 is because Mr. Weinberg tries to use these lower levels to
16 say that we're above average or excessive, but if you
17 actually look at the rates set by the credit card companies
18 or the network, we're not in that excessive category.

19 THE COURT: It really has to do with whether
20 they're going to cut you off or whether they're not.

21 MR. DePROSPO: That's correct, Your Honor. So
22 we're never even close nor do we exceed that excessive
23 threshold.

24 THE COURT: Never been cut off?

25 MR. DePROSPO: Have we ever been cut off,

1 Your Honor?

2 Based on the data that we've produced here, I'm
3 pretty sure we've never been cut off. Yeah, we've never
4 been cut off, Your Honor.

5 Unless you have any other questions -- I guess,
6 you know, just in terms of, you know, summing this all up,
7 Your Honor, chargebacks are an ordinary course of business
8 and an issue that merchants have to deal with. This isn't
9 an issue that just defendants' business deals with. This is
10 true from retail, again, food and beverage, people seek
11 chargebacks. Amazon has to deal with chargebacks. So this
12 is not a unique issue here, but, again, is any form of
13 evidence of deception or fraud on behalf of the defendants.

14 Defendants have tried their best to practice good
15 business by being proactive and issuing refunds where
16 necessary, and our chargeback rates have never been or
17 exceeded the excessive thresholds, but we have been cut off
18 from being able to process forms of payment, Your Honor.

19 THE COURT: Well, you use credit cards. Do you
20 also use access to the bank account?

21 MR. DePROSPO: Yes. These are called ACH returns.

22 THE COURT: Yes. Roughly, on a percentage basis,
23 credit cards versus that function, that's a minor function,
24 I assume. But is there a percentage that is capable of
25 being attributed to drawing down on the bank account versus

1 credit card?

2 MR. DePROSPO: So is Your Honor's question like
3 the actual number of clients who pay via ACH versus credit
4 cards?

5 I don't have that figure on hand with me now. I
6 would have to look into the number of our customers who pay
7 via direct transfer from their bank versus a credit card,
8 but I don't have that number offhand on me right now.

9 THE COURT: In the initial interview and in the
10 subsequent delivery of the contract, is that laid out as
11 part of the contract?

12 MR. DePROSPO: In terms of the forms of payment
13 that we accept? I would have to look at the language in the
14 contract in terms of the different forms of payment.

15 But I can say that we do have -- you can have a
16 primary form of payment and a secondary form of payment,
17 right? So a lot of people will offer up their credit card
18 or their debit card first, or their secondary option might
19 be to just do a direct, you know, wire transfer from their
20 bank. So I think it's just a matter of how the defendant
21 wants to pay for our services. Sometimes it might be, you
22 know, they prefer to do it via credit card versus a direct
23 transfer from their bank.

24 So it says in the contract here, Your Honor, that
25 your credit or debit card company, or bank -- so we accept

1 any of the three forms of payment there -- are laid out in
2 the contract as to how you can pay for our services.

3 THE COURT: Are most credit cards?

4 MR. DePROSPO: Again, Your Honor, I don't know
5 whether or not -- you know, again, I don't want to mislead
6 the Court as to if it's a majority of credit cards or it's a
7 majority of direct wire transfers. But, again, I could look
8 into that for you when I look into, you know, what is the
9 actual statistical breakdown.

10 THE COURT: I'm interested in the actual process.
11 But go ahead.

12 MR. DePROSPO: So you're interested in which
13 process, Your Honor?

14 THE COURT: The process of payment.

15 MR. DePROSPO: Okay. Do you want me to explain
16 the payment process?

17 THE COURT: Oh, I'm acquainted with it. I'm fine.

18 MR. DePROSPO: Okay. Well, Your Honor, if you
19 don't have any other questions, you know, again, I would
20 just like to emphasize that chargebacks are something that
21 all merchants have to deal with, right, and our position is
22 that they're not evidence of deception or fraud.

23 THE COURT: Some people even accept cash.

24 MR. DePROSPO: Yeah, for services. That is not
25 laid out in the contract, cash. I only laid out from what

1 it says here is, you know, credit cards, a bank, or your
2 debit card, Your Honor.

3 So, again, we would ask this Court to exclude
4 Mr. Weinberg's opinions because they're based on unreliable
5 methodology and insufficient facts and data, and we also
6 just don't think chargebacks are relevant to the matters
7 before this Court, and there are fact witnesses that can
8 cover these issues.

9 So thank you, Your Honor.

10 THE COURT: I'm happy to hear from the United
11 States. Tell me why we should be concerned with chargeback
12 at all.

13 MS. FERRARA: Yes, Your Honor. Alicia Ferrara for
14 the Bureau.

15 As Your Honor is aware, the Bureau has offered
16 Mr. Weinberg to opine on defendants' high levels of
17 chargebacks and ACH returns, particularly in the hotswap
18 marketing channel. And I think it would be helpful to
19 contextualize Mr. Weinberg's testimony.

20 I'd like to start with a brief description of the
21 evidence that the Bureau has developed relating to payment
22 disputes, so chargebacks and ACH returns, and how that fits
23 into our proof and is relevant to our claims on Counts 2
24 through 5, which are the deception claims.

25 Your Honor, the Bureau has developed evidence that

1 defendants had high dispute levels during the relevant
2 periods, and particularly for customers transferred from the
3 relevant hotswaps. I think that's a key piece that
4 defendants haven't quite acknowledged. But defendants were
5 keenly aware of this and they, in fact, attributed it to
6 misrepresentations made by particular ones of the relevant
7 hotswaps, that they went to great length, often
8 unsuccessfully, to rein in those chargebacks and return
9 levels. When that failed, they attempted to mask the
10 problem from the payment networks.

11 The Bureau intends to use this evidence to support
12 its showing that defendants knew about the
13 misrepresentations that the relevant hotswaps were making to
14 consumers.

15 THE COURT: How do they know?

16 MS. FERRARA: Mr. Weinberg will testify that based
17 on the evidence that he has reviewed in the record, so that
18 includes, for example, defendants' close tracking of their
19 chargeback and return levels. For example, in their key
20 performance indicator, KPI reports, defendants considered
21 chargebacks to be a key performance indicator. They tracked
22 them very closely.

23 And in that report, Your Honor, they actually
24 included top ten lists of the top ten marketing channels
25 contributing to the overall chargeback rates. Several of

1 the relevant hotswaps routinely appeared in that list.
2 OneLoanPlace, which we've talked about quite a bit,
3 Your Honor, was frequently number one. And there are many
4 other indications in the records, emails as well, indicating
5 that Progrexion was aware that OneLoanPlace chargebacks were
6 out of control, that they were, in fact, skewing the
7 company's overall chargeback levels.

8 He will also testify as to the payments risk
9 forum, which was a monthly meeting that defendants held
10 where they tracked their chargeback and dispute levels.
11 They were clearly aware that they had a problem with
12 chargebacks and were working very hard to bring them down.

13 He will also testify as to the fact that the
14 chargeback rates, the levels were worse in the hotswap
15 channel than for defendants' aggregate business.

16 Your Honor, I would point -- I would direct you to
17 the case FTC vs. Credit Bureau Center. That was a case
18 similar to this, involving affiliate marketing where
19 particular marketing affiliates were contributing to
20 chargebacks at a higher level, a market increase in one
21 particular marketing channel, and the court held that that
22 was a red flag that should have led the defendants to
23 realize there was something going on in that marketing
24 channel, that they were making misrepresentations to
25 consumers. And we have a quite similar situation going on

1 here.

2 There's also evidence that new customers were
3 charging back at higher rates than existing customers, which
4 is an indication as to the timing, an indication that this
5 was occurring during the sign-up process. Defendants were
6 also aware of that.

7 And then Mr. Weinberg will also testify as to
8 particular documents that he reviewed indicating that
9 defendants not only should have but, in fact, did make that
10 connection.

11 THE COURT: What document are you referring to?

12 MS. FERRARA: Sure, Your Honor. I will take you
13 through a couple of them.

14 So the first document, I believe it's Exhibit 6 to
15 defendants' motion to exclude Mr. Weinberg. There's an
16 intra email from Progrexion to OneLoanPlace saying the
17 biggest factor we see with ZPCs.

18 THE COURT: Now who is the author of the document?

19 MS. FERRARA: I would have to pull that up,
20 Your Honor.

21 It's Nils Evensen, who is a Progrexion employee,
22 and the email is being sent to Cam Stanton.

23 THE COURT: What does it say?

24 MS. FERRARA: It says the biggest factor we see
25 with ZPCs is if someone is promised they can pay for our

1 services using our loan.

2 THE COURT: Using what?

3 MS. FERRARA: Using our loan. So the implication
4 being that OneLoanPlace customers, that they believe that
5 they are going to get a loan from OneLoanPlace that they can
6 then use to pay their credit repair fee, and that that is
7 contributing to the rates of ZPCs --

8 THE COURT: Now who says that?

9 MS. FERRARA: The Progrexion employee to the
10 OneLoanPlace.

11 THE COURT: What is the name of the employee?

12 MS. FERRARA: Nils Evensen.

13 THE COURT: I'm sorry?

14 MS. FERRARA: Evensen.

15 THE COURT: Okay. What was the date on the
16 document?

17 MS. FERRARA: I don't have the document in front
18 of me, Your Honor, but I can certainly find that out.

19 THE COURT: Well, if we're talking about knowledge
20 on the part of Progrexion, I suppose the date is of some
21 moment and helpful to us because we're dealing with other
22 issues. Whether we're back in 2011 or whether we're in 2016
23 could be a difference.

24 MS. FERRARA: Your Honor, the email is dated
25 August 22nd, 2017.

1 THE COURT: What does it say?

2 MS. FERRARA: It says the biggest factor we see
3 with ZPCs, zero paying customers, is if someone is promised
4 they can pay for our services using our loan.

5 THE COURT: Okay.

6 MS. FERRARA: I can walk you through several other
7 documents as well, Your Honor.

8 There's another email. I believe this one was
9 from July of 2018. This email arose at the conclusion of a
10 period where OneLoanPlace had particularly high chargeback
11 rates. So, for example, during this period of time -- one
12 moment, Your Honor.

13 During the period from January 2017 to May 2018,
14 so towards the middle of our period, we have data showing
15 that OneLoanPlace in particular, its chargeback rates
16 ranged, at the lowest, 1.03 percent, which was already above
17 the Visa and MasterCard violation threshold, to 5.03
18 percent, which is five times that threshold.

19 THE COURT: So what? How does that equal
20 misrepresentation?

21 MS. FERRARA: So, Your Honor, I think what I was
22 explaining is that this evidence of these elevated
23 chargeback rates, particularly chargeback rates that surpass
24 these thresholds --

25 THE COURT: So what? How do we get

1 misrepresentation from the rate?

2 MS. FERRARA: Because it's an indication,
3 Your Honor, that basically what is -- as Mr. Weinberg will
4 explain -- and I think this partly goes to his usefulness as
5 an expert because he will be able to walk the fact finder
6 through this -- what happens when a payment is disputed, the
7 customer is indicating that something has happened, they are
8 challenging the payment.

9 THE COURT: Yeah, and it's the something that we
10 need to focus on, what has happened.

11 MS. FERRARA: So I think what the case law
12 indicates, Your Honor, is that when these chargebacks are
13 elevated in the way that they were with defendants, that is
14 an indication of deception and misrepresentation.

15 THE COURT: What case law says that? What case
16 are you referring to?

17 MS. FERRARA: Sure. I can refer you to several
18 cases that are cited --

19 THE COURT: Give me your best case.

20 MS. FERRARA: Sure. I think a particularly good
21 one for us that I've mentioned before, Your Honor, is FTC
22 vs. Credit Bureau Center.

23 THE COURT: What were the facts of that case?

24 MS. FERRARA: So that was a similar case involving
25 affiliate marketing, also of housing. So that was a case

1 where affiliate marketers were advertising houses on Craig's
2 List, that effectively didn't exist.

3 THE COURT: Okay. And they told untruths on
4 Craig's List?

5 MS. FERRARA: Yes, Your Honor.

6 THE COURT: Okay.

7 MS. FERRARA: So --

8 THE COURT: And you had specific evidence of
9 untruths on Craig's list?

10 MS. FERRARA: Yes. And --

11 THE COURT: Now that's a difference between what
12 we've got here. If you've got a specific representation on
13 the part of the affiliate speaking, purportedly, for himself
14 and for others, I'd be interested. But I'm interested in
15 specifics. And I wonder when I listen to or read the
16 opinions of the prospective expert witness, how he jumps
17 from the rate to the representation. It seems to me he's
18 got it in reverse. You would need the representation first
19 upon what people rely, and then they discover that the
20 representation is inappropriate and they want their money
21 back. They say I'm disputing this particular payment that
22 folks have in their pocket already and they want it back.

23 But I'm curious as to what, standing alone, the
24 rate equals misrepresentation. I have trouble making that
25 connection.

1 MS. FERRARA: Yes, Your Honor. I think it may be
2 helpful to clarify here because I don't think defendants
3 described it entirely accurately.

4 Mr. Weinberg is not saying that the rate alone is
5 what indicates deception. I think that's an
6 oversimplification of his opinion.

7 THE COURT: That's what it sounds like to me when
8 you look at what he says. What else does he take into
9 consideration?

10 MS. FERRARA: So what Mr. Weinberg did here is
11 what he refers to as a root cause analysis.

12 So to back up a little bit, Mr. Weinberg, he has a
13 lot of experience in the payments industry. Most recently
14 he has worked as a consultant for this firm called --

15 THE COURT: Just tell me the other factors that he
16 relies on.

17 MS. FERRARA: So as part of this root cause
18 analysis that he did, which is what he typically does for
19 his clients, he looked at the numbers. That was certainly
20 one part of it. He looked at the numbers in aggregate as
21 compared to the hotswaps. And he also looked at the reason
22 codes.

23 Now to explain a little bit about the reason
24 codes, I think I have to back up a little bit and explain
25 sort of how the process works. So when a customer goes and

1 they want to dispute a payment, they call up their bank and
2 they're going to give like a plain English description of
3 the reason they're initiating the dispute. What the bank is
4 then going to do is assign a reason code to that dispute.

5 Mr. Weinberg conducted an analysis of the reason
6 codes for defendants' chargebacks and returns. This is a
7 type of analysis that he routinely performs for his
8 consulting clients, one he is very familiar with. And he
9 bucketed the various reason codes -- the relevant reason
10 codes that were assigned to defendants' chargebacks.

11 THE COURT: What specific code says
12 misrepresentation?

13 MS. FERRARA: So there is one particular code that
14 says misrepresentation specifically. And then there is
15 another one called unauthorized. And it's Mr. Weinberg's
16 opinion that that code as well is indicative of potential
17 misrepresentation because it indicates that the merchant
18 behaved in some way that was not what the consumer was
19 expecting.

20 THE COURT: Now we're talking about
21 misrepresentation, and we get these fancy codes between
22 banks and lending institutions, and parents and children in
23 corporate structures, people punching a number in the
24 computer that says misrepresentation. The problem we have
25 is that we need somebody saying this is what they told me

1 and it was incorrect. I don't see that in Mr. Weinberg's
2 testimony.

3 MS. FERRARA: So I think, Your Honor, that aspect
4 comes in in other parts of our case. We certainly plan to
5 show --

6 THE COURT: We're talking about Weinberg, if he's
7 worth listening to. You know, how's he going to help.

8 MS. FERRARA: So I think how he's going to help
9 us, Your Honor, is he is going to take this set of evidence
10 that we've developed, that we maintain is relevant -- it's
11 actually fairly routine in these types of cases. Many
12 courts have admitted this to show deception.

13 THE COURT: They suggest he's not worth listening
14 to and you suggest that he is. And my question is why is he
15 worth listening to if he's just going to say excessive
16 chargebacks? What does that mean for a fact finder who is
17 concerned with misrepresentation? The fact that somebody
18 uses a code may or may not accurately portray what it's
19 supposed to portray.

20 MS. FERRARA: So I think, Your Honor, part of how
21 Mr. Weinberg will be helpful is he's going to explain all of
22 this. He's not going to just get up there and say it's
23 excessive. He's going to explain for the jury in quite
24 great detail how the payment system works, what is a
25 chargeback, what is an ACH return, what can we learn from

1 them.

2 THE COURT: We know a chargeback is a chargeback.
3 So what? How does that equal misrepresentation? That's the
4 question.

5 MS. FERRARA: Mr. Weinberg, he'll testify based on
6 everything that he looked at, not just the fact that they
7 were high, though that is certainly an important part of it,
8 based on the fact that they were high, the reason codes that
9 he looked at, the specific documents he looked at showing
10 that defendants made that connection, the ways that they
11 tried to mask it from the payments networks. It's really a
12 whole picture of evidence.

13 THE COURT: And that's fine. Why are we in a
14 position to even deal with it at this point?

15 MS. FERRARA: I think it's our assertion,
16 Your Honor, that it's quite relevant to the knowledge piece
17 of our case.

18 THE COURT: Well, I don't know because I don't
19 know what he's going to say.

20 MS. FERRARA: Right. I can proffer you more
21 specifically what he's going to say if that would be
22 helpful.

23 THE COURT: That would be helpful.

24 MS. FERRARA: So he's going to start --

25 THE COURT: Something beyond high rates. What

1 else is he going to say? High rates and chargebacks.

2 MS. FERRARA: So starting with the background,
3 which we've gotten into a little bit, he's going to describe
4 how the payment system works. He's going to describe what a
5 chargeback is, what a return rate is. I know it possibly
6 seems elementary to you, Your Honor, but the jurors may not
7 have that knowledge, and so that will certainly be helpful
8 to them. He will describe the dispute process, how a
9 consumer goes about disputing a payment. He'll describe the
10 consequences to merchants who have high dispute rates, why
11 that's vitally important. I think Your Honor mentioned cash
12 before. Merchants like the defendants can't accept cash.
13 It doesn't really work with their business model. So this
14 whole electronic payment system is extremely vital, and
15 he'll explain all of that.

16 THE COURT: I've been charged -- I've got a charge
17 on my credit card, it exists, and I dispute it. I can
18 dispute it for a hundred different reasons, one of which may
19 have been a misrepresentation. You say they code it.
20 Somebody codes it because somebody says something. I say
21 I've been misrepresented. I've been told something that
22 isn't true. Well, what have I been told and how do we know
23 whether it's true or not? I accept on face value what you
24 suggest and put in a computer code. So what? He looks at
25 the computer code. He doesn't look at what's been said.

1 MS. FERRARA: So I'll also note, Your Honor, in
2 terms of what was said, that is in the chargeback narrative.
3 So there is a specific narrative that the consumer gives to
4 the bank. But defendants refuse to produce those, and so
5 all we really have is the chargeback codes themselves. So
6 there is a specific narrative. We did not get access to
7 that through discovery because defendants wouldn't produce
8 it.

9 THE COURT: But you don't have that.

10 MS. FERRARA: We don't have that.

11 THE COURT: You purport to code that and reduce it
12 to a letter, or a figure, or a number. So what? What is
13 said? What is said? What is said?

14 MS. FERRARA: It's Mr. Weinberg's expertise. You
15 know, he looks at these codes for his clients all the time.
16 He spends a lot of time pouring over these codes and trying
17 to understand what information can be drawn from them. He
18 has a good sense sort of ferreting out these underlying
19 causes of chargebacks is what he does. That's his
20 expertise, and he has bucketed those accordingly.

21 And I'll --

22 THE COURT: Does he tell us the percentage of
23 those that he looked at where the code says deception,
24 misrepresentation?

25 MS. FERRARA: Yes, he does, Your Honor.

1 THE COURT: How much?

2 MS. FERRARA: We can pull that up actually. One
3 moment.

4 Can we please pull up Plaintiff's Exhibit 502,
5 Amanda.

6 So this is the chart, Your Honor, showing his
7 breakdown. As you can see, the actual express
8 misrepresentation was about seven percent, but the
9 transaction not recognized or authorized, which Mr. Weinberg
10 will also testify, indicates deception was about 53 percent.

11 THE COURT: Say that again. Deception is how
12 much?

13 MS. FERRARA: The ones that went to that
14 particular category were coded as seven percent, and then
15 53 percent was a transaction not authorized.

16 THE COURT: Well, that's different. It's one
17 thing to say I didn't buy it, I didn't authorize it, I
18 didn't order it, and another thing to say I was told a lie.
19 I was told something that wasn't true.

20 MS. FERRARA: Right. Mr. Weinberg did quite a bit
21 of analysis on this transaction not authorized category to
22 sort of pinpoint that, because there are a number of
23 different things that can attribute to that.

24 THE COURT: Not authorized is different than
25 misrepresentation.

1 MS. FERRARA: I think -- it's Mr. Weinberg's
2 testimony, and I think how he has explained it is that
3 saying it's not authorized is an indication that the
4 merchant behaved in some way that was different from what
5 the consumer was expecting. So it can also be indicative
6 that the consumer was led to believe something and didn't
7 get that out of the transaction. He did a quite robust
8 elimination of alternative explanations on that category to
9 get to that.

10 THE COURT: We've got to deal with specifics.
11 It's one thing to say misrepresentation and quite another
12 thing to say not authorized. Here we're talking about
13 patterns within a particular industry, so-called credit
14 repair. Okay. Is the seven-percent figure a comparable to
15 what's present in other comparable industries?
16 Misrepresentations, seven percent?

17 MS. FERRARA: I don't know the answer to that
18 question, Your Honor.

19 THE COURT: Nor do I.

20 MS. FERRARA: I don't think Mr. Weinberg looked at
21 that. But the 60 percent, it was his opinion that the
22 unauthorized is indicative of misrepresentations as well,
23 and the 60-percent figure he did find to be pretty
24 indicative of misrepresentations among that population of
25 hotswapped consumers.

1 THE COURT: You know, we're dealing with specific
2 transactions over a period of time. Okay. You go ahead.

3 MS. FERRARA: All right. So I was just going to
4 explain a little bit more about that unauthorized category
5 and sort of how he analyzed it. It is a little bit less
6 straightforward, and so he did a little bit more digging
7 under those codes, and the ones that he put into that
8 category are the ones that he thought indicated
9 misrepresentation. And so he eliminated a few alternate
10 explanations in doing that.

11 For example, certain things that can frequently
12 end up in that category, it can generally be a couple of
13 different things. It can be fraud or deception on the part
14 of the merchant. That is certainly one of them. It can
15 also be third-party fraud, so, for example, if a credit card
16 is stolen. And it could also be something called friendly
17 fraud, which is when, you know, a consumer purchases a
18 product and then initiates a chargeback denying the
19 legitimacy of that transaction.

20 So he looked at the specific codes that were in
21 that category, in the context of the facts of this case, to
22 eliminate those alternate explanations, which led him to the
23 conclusion that it was most plausible that in this case,
24 based on the facts of this case, that the codes that were in
25 that category were indicative of misrepresentation.

1 So, for example, as he wrote in his report and as
2 he would testify, it's pretty unlikely that a third party
3 would use a stolen card to purchase credit repair. It's not
4 the kind of tangible good that can be resold or immediately
5 used. Any potential value is sort of dependent on that
6 relationship between the customer and the company over time.
7 It would also just be trivially easy to get caught given the
8 types of information that you have to give to make the
9 purchase. So third-party fraud he didn't think was a likely
10 contributor to this.

11 And friendly fraud he also found implausible.
12 Many of the same reasons why he ruled out third-party
13 criminal fraud, he also ruled out friendly fraud.

14 Many of the other alternative explanations that
15 defendants have put forth, as he explains in his reply to
16 Mr. Mott, simply don't make sense given the pattern that
17 he's identified where the hotswap channel was worse.

18 So, for example, I think the example came up in
19 defendants' presentation about billing in arrears, customers
20 charging back because they were confused about that, but
21 that is something that applies to defendants' business as a
22 whole. It fails to account for the pattern that
23 Mr. Weinberg has identified where the hotswap channel, in
24 particular, was worse.

25 And so all of those considerations led him to the

1 conclusion that based on the facts of this case, his
2 knowledge of this topic from his years of expertise, looking
3 at that 53 percent, that it was most plausible that
4 defendants' high unauthorized rate was due to
5 misrepresentation.

6 I will also point out that NACHA, which is the
7 industry group that creates the rules for the ACH network,
8 it's an administrative body, has specifically made the
9 connection between telemarketed transactions over the phone,
10 the risk that those transactions could be the result of
11 deceptive telemarketing, and the fact that that would likely
12 result in higher levels of unauthorized returns, and some of
13 those statements from NACHA sort of expressly making that
14 connection between the deception and the unauthorized
15 category are quoted in Mr. Weinberg's report.

16 THE COURT: Okay. Anything else you want to tell
17 me?

18 MS. FERRARA: There are a couple of points that
19 defendants made that I would just like to touch on briefly,
20 Your Honor.

21 With respect to Mr. Weinberg's opinion that the
22 knowledge piece, that it's improper legal testimony, we
23 believe that he -- I understand that that issue can be a
24 close call. I just want to clarify as to what he will say.
25 He's going to testify based on what the evidence in the

1 record indicates to him.

2 I'll note that Rule 704(a) does not prohibit in a
3 civil case an expert from testifying on an ultimate issue.
4 And I also direct the Court to a Tenth Circuit case, United
5 States vs. Schneider, which says that an expert witness can
6 testify as to mental states where they're talking about what
7 the evidence indicates to them. So they're not purporting
8 to know or be inside the entity's head, but that they're
9 simply looking objectively at the evidence and saying what
10 it indicates to them. We think that defines sort of the
11 proper paremeter of what he can say, and his testimony will
12 fall within that.

13 THE COURT: Does the corporate structure have a
14 mental state?

15 MS. FERRARA: I'm sorry, Your Honor?

16 THE COURT: Does a corporate structure have a
17 mental state?

18 One of the defendants here, among others -- there
19 are others -- there are a number of corporations. I'm
20 curious as to whether the corporation has a mental state.

21 MS. FERRARA: I think part of Mr. Weinberg's -- I
22 think part of what we're hoping to show through
23 Mr. Weinberg's testimony on that knowledge point is that
24 this knowledge that the chargeback situation was bad, this
25 knowledge that it was worse among the hotswaps, that

1 knowledge went up pretty high within the Progrexion
2 organization. It was in the KPI reports, which were
3 distributed to executives. It was in the payments forum
4 that this was an important issue to them at an
5 organizational level and that their knowledge of it went
6 quite high.

7 THE COURT: Any particular executive you are
8 pointing to?

9 MS. FERRARA: So on some of the emails we have
10 cited to you, you have Jesse Beal, who is fairly high up.
11 He had different positions at different times. I'm not sure
12 if I can name the title on the spot, but I can certainly get
13 that to Your Honor.

14 Kelly Etherington, who was the vice president for
15 compliance was on some of the emails. And I believe that
16 the KPI reports also were distributed up as high to the CEO.

17 THE COURT: Okay.

18 MS. FERRARA: Then, Your Honor, I won't keep you
19 too much longer, but there are two more points the
20 defendants made that I just want to correct for the record.
21 With respect to the thresholds, the relevance of those
22 thresholds, I want to explain a little bit more about that.

23 So throughout the majority of the relevant period,
24 Visa and MasterCard, which are the card networks, set
25 thresholds for acceptable levels of chargebacks and returns.

1 For the majority of the period, it was .75 percent to
2 receive a warning and one percent to receive a violation.

3 Now once you pass that one percent, there could be
4 a series of consequences. You could be fined. You could be
5 placed on a monitoring program. You could have to submit a
6 chargeback performance plan. And if the problem goes on and
7 isn't fixed, you could theoretically lose the ability to
8 accept cards, which obviously would be a death blow in
9 modern commerce. So that is the importance of those
10 thresholds and that is why Mr. Weinberg chose to focus on
11 them.

12 Those thresholds implicitly account for the fact
13 that different industries have different, you know, average
14 levels of chargebacks. There are no special thresholds for
15 telemarketers. Those thresholds apply to everyone and
16 they're an objective measure that he has chosen to use.

17 I also just wanted to say, with respect to the
18 article that was mentioned with respect to Mr. Weinberg
19 about use of reason codes, just to give a little bit of
20 context on that, Mr. Weinberg wrote an article a number of
21 years ago where he was advocating for organizations to pay
22 closer attention to chargeback reason codes, and he urged
23 defendants to look beyond the face of the codes and do a
24 deeper analysis to understand the root cause of chargebacks.
25 So he was not saying in that article that chargeback reason

1 codes cannot be relied upon. Quite the opposite. He was
2 saying that organizations can and should rely on them, but
3 they should do a more holistic analysis to truly understand
4 what is contributing to those reason codes, what is the
5 underlying cause, and that is what he did here.

6 So that far from undercutting him, that article
7 actually bolsters what he did in this case.

8 THE COURT: Anything else?

9 MS. FERRARA: Nothing else for now, Your Honor.

10 THE COURT: Okay. Fine.

11 Mr. DeProspo. You go ahead.

12 MR. DePROSPO: So I will just say it again for the
13 Court, Mr. DeProspo for the defendants.

14 So, Your Honor, I just want to bring it back to,
15 you know, the really critical point here, right, is that
16 chargebacks are not relevant to deceptive marketing and/or
17 sales practices. There is no causal link between chargeback
18 rates and being able to show deceptive marketing and/or
19 sales practices on behalf of the defendants.

20 THE COURT: Deceptive marketing is an excuse for a
21 chargeback?

22 MR. DePROSPO: It could be one possible. But,
23 again, Your Honor, I think that the problem here and the
24 major fatal flaw to Mr. Weinberg's opinions is he doesn't
25 take into account any of these other alternative

1 explanations that I discussed with Your Honor before.
2 Again, the only ones that the government mentioned was
3 deceptive marketing and/or fraud, and then identity theft.
4 And other than that, again, I already explained all of the
5 other possible explanations that Mr. Weinberg doesn't
6 consider.

7 And the other point that I just want to make here
8 too, Your Honor, is the government points to that FTC case,
9 right? And in that case I think it's really important to
10 distinguish the difference there between that case and the
11 case before Your Honor.

12 So in that case, right, there was one affiliate
13 who had generated 2.7 million visitors to the defendants'
14 site. And that accounted for 89 percent of the chargebacks,
15 which is very different here. We have multiple affiliates
16 that we work with. We're actually only looking at six
17 potential partners -- actually now even less because the
18 government has excluded others. And so, again, that case is
19 very much distinguishable from this one.

20 In addition, Your Honor, in that case, in the FTC
21 case, there were also customer declarations that there was
22 confusion, right, and we don't have that here in this case.
23 So, Your Honor, I think the case that the government cites,
24 this FTC vs. Credit Bureau Center, LLC, is very
25 distinguishable from the facts before Your Honor, and so

1 that case I would say is unreliable.

2 So, again, just one last point, Your Honor, on
3 those reason codes. We keep coming back to the reason
4 codes. And if you looked at what the government showed you,
5 even in Mr. Weinberg's own report for that seven percent
6 that supposedly are misrepresentations of services, if you
7 actually look at page 64 of his report that explains this
8 seven-percent number -- just give me one moment, Your Honor,
9 to bring it up here.

10 If you actually look at the misrepresentation of
11 services category and you look at the code associated with
12 it, it could be services not rendered, nonreceipt of goods
13 or services. This isn't an evidence of deception or fraud,
14 and yet the category that it's placed into is
15 misrepresentation of services.

16 The other explanations for it, you know,
17 collaborative flow, consumer not even described the reason
18 for seeking the chargeback. So if you look even at the
19 reason codes that Mr. Weinberg says is misrepresentation of
20 services, they're not even actually chargeback reason codes
21 that are deception and/or fraud.

22 So, Your Honor, I think, again, you know, as your
23 line of questioning pointed out to the government, there is
24 a huge missing link here. Chargebacks are irrelevant to the
25 matters before this Court. It is not evidence of deception

1 and/or fraud on behalf of the defendants in any of the
2 services and/or marketing practices, Your Honor.

3 So unless you have any further questions, I'd just
4 ask this Court again to exclude Mr. Weinberg's expert
5 opinions because they are not relevant to the matters before
6 this Court. Thank you.

7 THE COURT: Why don't I give you a ten-minute
8 break. And are we down to Victor Stango? We may have
9 skipped somebody. But, at any rate, let's take ten minutes.

10 (Recess)

11 THE COURT: I think we're down to Victor Stango.

12 MS. HILMER: Thank you, Your Honor. Tracy Hilmer,
13 again, for the Bureau.

14 Your Honor, the Bureau seeks to exclude Dr. Victor
15 Stango, who's an expert that has been proffered by the
16 defendants to speak about economic damages. There's no
17 claim for economic damages in this case. The Bureau is
18 seeking legal or equitable restitution or refund of monies
19 in the context of redress for consumers.

20 THE COURT: How do you distinguish between legal
21 and equitable restitution?

22 MS. HILMER: I'm so glad you asked, Your Honor.
23 This was recently explained very succinctly by the Ninth
24 Circuit in the Cashcall case that came out in May -- just in
25 May. So here's the difference.

1 Restitution is a legal remedy when ordered in a
2 case at law and an equitable remedy when ordered in an
3 equity case, and whether it's legal or equitable depends on
4 the basis for the plaintiff's claim and the nature of the
5 underlying remedy sought. That's a quote from the Supreme
6 Court's decision in Great-West Life & Annuity Insurance
7 Company vs. -- I'm going to hopefully get this right --
8 Knudson, begins with a K, 534 U.S. 204, from 2002.

9 So restitution is legal when the plaintiff cannot
10 assert title or right to possession of particular property.

11 THE COURT: You're not claiming anything
12 except --

13 MS. HILMER: We're claiming consumer relief.

14 THE COURT: Well, that's a different question.

15 MS. HILMER: That's the restitution.

16 THE COURT: But the United States isn't asking for
17 anything back. You're asking on behalf of others?

18 MS. HILMER: Correct. That's right, Your Honor.

19 So as the Cashcall court articulated, where
20 consumer relief is -- we're not seeking to trace funds here.
21 What we're seeking to do here is to obtain net revenues.
22 We're seeking to obtain back for the consumers what they
23 paid less any refunds that the defendants already gave them.
24 That's the appropriate measure of restitution that was
25 endorsed in the Ninth Circuit's decision, and it really is

1 consistent with the Tenth Circuit's decision in Kuykendall
2 and also in Freecom. The starting point in a case like this
3 that involves mass deception of consumers is to try to put
4 the consumer back in the status quo ante by returning to
5 them what they paid less any refunds that have already been
6 returned to them. So that's the relief that we're seeking.

7 We are also seeking penalties and that's clearly
8 something for the Court to -- the Court has discretion on
9 that.

10 THE COURT: I'm curious. You're suggesting this
11 is a form of legal restitution, and I'm interested in your
12 Tenth Circuit cases. Tell me why they justify what you're
13 asking for here. Why are you entitled to bring an action on
14 behalf of anybody?

15 MS. HILMER: Well, the CFPA, the Consumer
16 Financial Protection Act, gives us not only that right but
17 that duty.

18 THE COURT: Read that section to me.

19 MS. HILMER: The section of the CFPA?

20 THE COURT: That you're relying on.

21 MS. HILMER: Let me -- I believe I have it.

22 Excuse me, Your Honor. Let me pull it up.

23 I rarely leave home without my statutes,
24 Your Honor, so relieved.

25 Litigation authority. So this is 12 U.S.C.

1 Section 5564(a). In general, if a person violates a federal
2 consumer financial law, the Bureau may, subject to various
3 sections, commence a civil action against such person to
4 impose a civil penalty or to seek all appropriate legal and
5 equitable relief including a permanent or temporary
6 injunction as permitted by the law.

7 Then under 12 U.S.C. Section 5565 (2), relief is
8 defined as follows: Relief under this section may include,
9 without limitation, rescission or reformation of contracts,
10 refund of monies or return of real property, restitution,
11 disgorgement or compensation for unjust enrichment, payment
12 of damages or other monetary relief, public notification
13 regarding the violation, including the costs of
14 notification, limits on the activities or functions of the
15 person, and civil money penalties, as set forth more fully
16 below.

17 THE COURT: And what portion of that do you rely
18 on?

19 MS. HILMER: We rely on two portions of it. We
20 seek refund of monies, which is section 5565(a)(2)(B), and
21 restitution, which is (C) under the same subsection.

22 THE COURT: Okay. Traditionally restitution is at
23 least historically equitable, is it not?

24 MS. HILMER: You are correct, Your Honor. And
25 it's an interesting question. These cases rely on treatises

1 as well was the Supreme Court's decision in Knudson.

2 And I would also refer to -- there is a Supreme
3 Court case that I can get you the full cite Granfinanciera.
4 That's a 1989 decision, the Granfinanciera case. These are
5 cases where the Supreme Court has recognized that when a
6 plaintiff is seeking a sum of money in a federal action, and
7 not a tracing of money, just seeking a sum of money, that
8 things that traditionally may be called an equitable remedy
9 is really a legal remedy, because that's what we're seeking.

10 We're not looking for, you know, some fiduciary
11 who transferred the money, and then transferred it and
12 transferred it. That's not what we're doing here. We are
13 saying that consumers paid money for these services. They
14 were improperly charged for those services under Count 1
15 because those billing restrictions had not yet been
16 satisfied. And under Counts 2 through 5, the sale of credit
17 repair services was a product of deceptive marketing either
18 through Progrexion's agents or with Progrexion's
19 participation, knowledge, and control -- or control.

20 So in that setting, we're not seeking some
21 particular pot of money. We're just seeking the return of
22 monies to the consumers in the amounts they paid less any
23 refunds previously paid.

24 THE COURT: Which consumers are you representing?

25 MS. HILMER: Well, the Bureau, as a federal

1 agency, represents -- the Bureau on behalf --

2 THE COURT: How do you identify those folks that
3 you say have been had?

4 MS. HILMER: Yes. Well, Your Honor, it's the
5 people who -- we do it in two ways under the two different
6 sets of counts. Under Count 1, it's anybody who paid for
7 credit repair services when the defendants had not satisfied
8 the requirements of 16 C.F.R. Section 310.4(a)(2). And
9 you've heard all about that. You've heard about that
10 probably more than you want to hear about it.

11 THE COURT: I still have that matter under
12 advisement.

13 MS. HILMER: You do. You do. And if the Court
14 were to grant judgment on that, then all of the consumers
15 who made payments during the relief period for credit repair
16 services and for whom the defendants could not show they
17 satisfied the billing requirements, all of those folks
18 should get their money back, except accounting for any
19 refunds already paid.

20 On the deception side, for the deception counts,
21 it's similar. Anybody who was hotswapped by one of these
22 relevant hotswaps that engaged in deceptive marketing and
23 bought credit repair services should receive their money
24 back less a refund. That's the standard. That's the
25 standard that was accepted, has been accepted. You know,

1 it's guiding authority as to an en banc decision by the
2 Tenth Circuit in FTC vs. Kuykendall. And then the Tenth
3 Circuit also expanded on that a bit a year later in the
4 Freecom decision, FTC vs. Freecom.

5 So we've laid out -- because the Court was
6 interested in this last time, the parties provided the Court
7 in our recently filed pretrial order an appendix that lays
8 out, from each party's perspective, what is the plaintiff's
9 burden on Counts 2 through 5. What is the plaintiff's
10 burden to show liability, and then what are the additional
11 showings required to obtain consumer relief.

12 THE COURT: If you get relief under Count 1, then
13 does 2 through 5 go away?

14 MS. HILMER: Well, it doesn't go away. It's still
15 an alternate -- it's still an alternate. But as a practical
16 matter, of course the Bureau is not seeking duplicative
17 relief. So if we obtain relief under Count 1, that would
18 cover at least part of Counts 2 through 5, because Counts 2
19 through 5 cover an additional time period. They go back
20 farther. But if somebody has already been reimbursed fully
21 for what they paid from March 8th, 2016 to the present,
22 we're not going to ask for that twice obviously.

23 And of course I'm happy to address the Court's
24 questions on this. It's a fascinating question really. And
25 I think the Cashcall decision that just came out in May

1 really explains how this form of relief, which had been
2 accepted for many years in pretty much all the courts under
3 the FTC's Act, how that now plays out under the CFPA,
4 because under the CFPA we have explicit authority to seek
5 this relief. We have explicit authority to seek legal and
6 equitable relief, whereas the FTC --

7 THE COURT: They give you both of them?

8 MS. HILMER: They give us everything, whatever is
9 appropriate.

10 THE COURT: They don't distinguish them.

11 MS. HILMER: They don't. They don't distinguish
12 them. That's for the Court to do, you know, after
13 consulting the case law -- the authoritative case law.

14 But I think the Supreme Court's decisions are also
15 very clear. They explain when relief like this, which has
16 traditionally -- let's say premerger of law and equity, were
17 traditionally thought of as equitable remedies. But if
18 you're just getting a sum of money back, then that's under a
19 legal claim, which this unquestionably is. I mean you've
20 heard from both sides that it's a legal claim. That's why
21 there's a jury right. That means --

22 THE COURT: It hasn't been decided whether there
23 is a jury yet.

24 MS. HILMER: We leave it in the Court's hands.

25 I will say that when the relief being sought is a

1 sum of money and not a particular source --

2 THE COURT: Aren't you trying to get an injunction
3 as well?

4 MS. HILMER: We seek that in addition. But that
5 doesn't -- the fact that we seek injunctive relief is in
6 addition to any legal relief we seek.

7 You know, in an appropriate case, the Bureau could
8 seek damages. And let me give you an instance of what would
9 be kind of a damages claim in a case like this.

10 For example, suppose people were -- suppose people
11 were being charged without authorization on their bank
12 accounts by the defendants, right, and they had overdraft
13 fees. So not only would they be entitled to get back the
14 money that was improperly drawn, but they might also be able
15 to get overdraft fees, which would be damages.

16 Here, that's different than what we're seeking.
17 And it's --

18 THE COURT: You're not asking for damages, are
19 you?

20 MS. HILMER: We are not asking for damages.

21 What I will say, as the Court has identified,
22 there are times when the form of remedy that we seek, which
23 is what the consumers paid less refunds already received,
24 when that has sometimes been called damages, but it can be
25 called damages or restitution, it's been called, you know,

1 unjust gains, the formula is what matters, and the formula
2 here is what the consumers paid less the refunds. And
3 that's been consistent in these kinds of cases, these large
4 consumer cases where there has been a showing of deceptive
5 or unfair practices.

6 THE COURT: What does that have to do with our
7 friend Victor Stango?

8 MS. HILMER: Well, that's my question, Your Honor.
9 What does it have to do with Victor Stango? Why is he here?

10 He was proffered as an expert to talk about
11 economic damages, and all he did along those lines was an
12 interest rate calculation for the consumers based on their
13 payment of monies before the six months expired, before the
14 requirements of Count 1. So he did that. And he used the
15 three-month Treasury bill rate.

16 None of this makes any sense to me, Your Honor. I
17 mean none of it makes any sense in the context of this case
18 because it's not the relief we're seeking. The three-month
19 Treasury bill rate is a rate that the government -- a very
20 privileged rate that the government gets to pay. These
21 folks aren't getting a three-month Treasury bill rate when
22 they, you know, have to create a balance on their credit
23 card to pay for these services. They're paying 20 or
24 24-percent APR, or maybe even higher, right? So why is he
25 here? He doesn't really contribute to anything.

1 The other thing I would point out, Your Honor, is
2 the defendants want to offer him to provide some evidence
3 that they are entitled to offsets beyond the refunds. You
4 know, there are benefits that the consumers got. And he
5 posits some of these benefits, but he has done absolutely
6 nothing to quantify them, study them, or really even
7 describe them. He just sort of postulates there could be
8 these benefits and one ought to think about that.

9 But that doesn't help us at all, Your Honor. That
10 doesn't tell us what the consumer redress calculation is
11 going to be. It's defendants' burden to prove any offsets
12 under Kuykendall and Freecom, and Cashcall and the like.
13 The speculative and just nonwork that Dr. Stango has done
14 can't come close to carrying that burden.

15 He says things like, well, you should consider the
16 value of the consumer education that the defendants provide.
17 Well, would people have signed up for their service and paid
18 them for that consumer education or would they have gone on
19 to the Internet and gotten it for free from the CFPB or
20 Credit Karma, or Experian, or some other source? Would they
21 have really paid the defendants for that? There's no
22 showing they would have, and Dr. Stango didn't study it.

23 He also posits that, well, you know, the
24 defendants have -- or the defendants' services are valuable.
25 It's helped them -- it's helped at least some consumers.

1 But they haven't shown that. They can't show that anything
2 they did, any trade line they removed was removed because of
3 something they did versus, let's say, for example, the age
4 of the item. Seven years passes, the item falls off the
5 credit report. They have done no tracking of that. They
6 can't tell you a thing. This is also, as the Court is well
7 aware, one of our main complaints about Mr. DelPonti and it
8 remains one.

9 So what does Victor Stango have to do with this
10 case? I have been puzzling about that myself, Your Honor.
11 The defendants provided in interrogatories a -- in
12 interrogatory answers a response to the question for each
13 year, for each of their brands, how much gross receipts did
14 you receive from consumers minus refunds? And so for Count
15 1, that's what we used.

16 And for Counts 2 through 5, we did a summary table
17 counting up the payments made by each of the consumers
18 hotswapped by the relevant hotswaps, minus refunds. They
19 gave us that data. So why do we need an expert for any of
20 this?

21 I think there's a couple of other things they have
22 Dr. Stango do. But, again, why do you need it? He gives an
23 overview of defendants' services just by reading their
24 website. That doesn't sound proper. That sounds like
25 trying to use an expert to get in hearsay material that

1 can't otherwise come in.

2 He himself said that he is not -- he does not hold
3 himself out as an expert in economic damages, and he did no
4 model. He just has nothing to contribute here. Honestly,
5 Your Honor, I have no idea why he's on the table at this
6 point.

7 I think it's important to note that defendants
8 have at times claimed, as I alluded, claimed that the whole
9 value of their services should be deducted from the consumer
10 redress, but they have no authority whatsoever for that
11 point. I mean it's like Bernie Madoff saying to his
12 victims, well, okay, I took some of your money under fraud,
13 but some of you I gave really good investment advice. So we
14 should deduct the amount of the investment advice from
15 whatever restitution you get. That's just not a thing --
16 that's not something that a court should do. It's not
17 proper.

18 If these services were obtained, as we allege,
19 based on a significant misrepresentation about a major
20 premise underlying the bargain, if you will, as Cashcall
21 says, if that's the case, then whatever benefit -- claimed
22 benefit or value of the services defendants may assert is
23 completely irrelevant. That's what the Cashcall case held.

24 So here the consumers who signed up -- focusing on
25 Count 1, the consumers who signed up were never told that

1 defendants couldn't charge them until six months had passed
2 and they produced a -- six months had passed and all the
3 services had been provided, and they produced evidence in
4 the form of a consumer report showing the results. They
5 weren't told that. They collected the money right away.
6 How many of those consumers would have paid right away if
7 they had known that's what the rule was?

8 And the same thing on the deceptive hotswap side.
9 How many of those consumers that signed up through a hotswap
10 that used the deceptive advertising would have signed up for
11 credit repair if they had known that these products, you
12 know, these rent-to-own houses, these loans, these mortgages
13 were completely illusory?

14 So defendants have offered Dr. Stango for no
15 discernable reason. They have offered him for no evidence
16 that is admissible. He admits he's not qualified to give
17 the very testimony they, you know, proffer him for, and we
18 think he should be excluded.

19 Thank you, Your Honor.

20 MR. WHITELEY: Good afternoon, Your Honor. Daniel
21 Whiteley on behalf of the defendants, also with Williams &
22 Connolly.

23 The Court's indulgence while I get set up here for
24 a second.

25 Your Honor, the reason that Dr. Stango is relevant

1 is because the Bureau wants to assume that net revenues is
2 the appropriate measure of restitution here. But what we
3 didn't hear at all during their argument is the fact that
4 it's their burden to establish that that is the appropriate
5 measure in the first instance. They want to skip over that
6 fact and jump straight to shifting the burden to defendants.
7 But that's not the law. The law is that they have to
8 establish that it's appropriate in the first place. And
9 what Dr. Stango does is he shows why that's not the case.

10 In his report he lists a number of reasons why net
11 revenues as opposed to some other measures, such as net
12 profits, or setting aside values that -- value that
13 consumers received for what they paid for, not all goes to
14 show that net revenues is not the appropriate measure of
15 restitution.

16 They talked a little bit about the Treasury bill
17 calculation. What Dr. Stango is illustrating with that
18 point is for Count 1 specifically. And it's interesting,
19 they talked about this as a deception claim almost, but I
20 want to refer the Court back to the PTO that the parties
21 just submitted. They make very clear all parties agree that
22 deception is not an element of Count 1. That's the TSR
23 advanced billing fee provision. Deception has nothing to do
24 with Count 1.

25 The Bureau's new interpretation of that, under

1 their theory, says that you have to wait six months after
2 the completion of the services in order to charge and you
3 have to show some results in order to charge. Obviously
4 defendants vehemently disagree, and we think that's a novel
5 interpretation of the law that has never been applied
6 before.

7 But what Dr. Stango does, he says --

8 THE COURT: Well, what's wrong with it?

9 MR. WHITELEY: Sorry?

10 THE COURT: What's wrong with it?

11 MR. WHITELEY: Wrong with their interpretation?

12 THE COURT: Their novel interpretation.

13 MR. WHITELEY: Well, it's contrary to the plain
14 language of the text. Promised results means promised
15 results. The history of the enforcement of this statute
16 shows that that's what it's used for. When there's a credit
17 repair --

18 THE COURT: How do you define results?

19 MR. WHITELEY: Well, I would have to define it in
20 the context of promised results, Your Honor, and in that
21 case it would mean that a credit repair company says,
22 Judge Jenkins --

23 THE COURT: Why does the statute -- or the reg, I
24 should say, talk about promised results?

25 MR. WHITELEY: Well, that's what the law

1 prohibits. You have to promise something for it to come
2 into play.

3 THE COURT: Why don't you read me that again.

4 MR. WHITELEY: I don't have that in front of me.
5 Give me a second and I can pull it up.

6 As usual, my team is more organized than I am.

7 So we're looking at the telemarketing sales rule.
8 We usually call it the TSR. It's 16 C.F.R. Section
9 310.4(a)(2), and specifically subsection (a)(2)(ii) -- or
10 just (a)(2) in general, requesting or receiving payment of
11 any fee or consideration for goods and services --

12 THE COURT: Slow down. Slow down. Make a record.
13 Make sure that the court reporter makes a record. If you
14 talk like a machine, she won't get it.

15 MR. WHITELEY: Yes, Your Honor.

16 So going back to 310.4(a)(2), requesting or
17 receiving payment of any fee or consideration for goods or
18 services represented to remove derogatory information from,
19 or improve, a person's credit history, credit record, or
20 credit rating until, and it's got the two subsections. The
21 first, the time frame in which the seller has represented
22 all of the goods or services will be provided to that person
23 has expired. And, the second subsection, the seller has
24 provided the person with documentation in the form of a
25 consumer report from a consumer reporting agency

1 demonstrating that the promised results have been achieved,
2 such report having been issued more than six months after
3 the results were achieved.

4 THE COURT: Okay. And what do you promise to do,
5 if anything?

6 MR. WHITELEY: We do promise to do certain things
7 for our clients. We promise to work on their behalfs. We
8 promise to --

9 THE COURT: Whatever that means. Maybe you can
10 define what you mean by work on their behalf.

11 MR. WHITELEY: The work that we do on our clients'
12 behalfs typically falls into a few things. One, sending
13 electronic challenges to the credit bureaus. We promise our
14 clients that we will do that for them, to send those.

15 THE COURT: And you sent it for some purpose?

16 MR. WHITELEY: We send it at the client's
17 direction. The client engages us to send these out in the
18 engagement agreement. So we're acting at the client's
19 direction.

20 So we agreed to do that on behalf of the client,
21 but we are very, very astute to not promise any results.

22 THE COURT: Oh, no. There's some purpose in
23 sending a letter. The letter isn't sent with no purpose.
24 You're at least calling your attention -- calling attention
25 to the credit bureau of a particular item which appears in

1 the credit report.

2 MR. WHITELEY: Yes.

3 THE COURT: And you've promised to do that.

4 MR. WHITELEY: We do agree to send letters and
5 challenges on behalf of the client.

6 THE COURT: And you send letters to furnishers as
7 well?

8 MR. WHITELEY: Yes. That's another thing we agree
9 to do on behalf of the client.

10 THE COURT: That's as a result of the conversation
11 the telephone operator has when inquiry is made and
12 information furnished?

13 MR. WHITELEY: That is what we agree to do.

14 THE COURT: And it's sent in the client's name?

15 MR. WHITELEY: Correct.

16 THE COURT: And the client's address?

17 MR. WHITELEY: Yes.

18 THE COURT: Okay. And you don't ever furnish a
19 credit report to a client six months after the initial
20 contract is entered into?

21 MR. WHITELEY: I know that we do it at the start.
22 I would have to check on if there is a period. I know that
23 we send updates about scores. I am less sure, standing
24 here, if there's a periodic six month, or some period, where
25 we do send an updated report.

1 THE COURT: A new credit report?

2 MR. WHITELEY: Yes. I'm not sure about that,
3 Your Honor, if there is a regular time where we do that
4 after the initial consultation and sign-up.

5 THE COURT: What are we talking about as far as
6 your services go? What do you do? You get paid for
7 something.

8 MR. WHITELEY: We get paid for the things we just
9 described, sending out these letters and challenges on
10 behalf of the client.

11 And another part they are paying for is
12 convenience. The CFPB itself has acknowledged and put out
13 studies showing that most people who try this on their
14 own -- I think it's about half the people who try this on
15 their own, they give up. The system is designed to confuse
16 people, get them to fail. And they are paying for ease of
17 use and our company's expertise in this area. We've been
18 doing this for decades and we know how the system works and
19 how to get -- how to do this effectively.

20 THE COURT: Okay. And other than the setup
21 charges that people talk about, and the sale of credit
22 report to begin with, what services do you perform before
23 you use a credit card or pull down a bank amount?

24 MR. WHITELEY: So this is laid out in the
25 engagement agreement. I'm looking at Bates stamp LEX520, at

1 the top of this page. It's in the first few pages of the
2 engagement agreement. It says that Lexington performs one
3 or more of the following services before you pay: Enters
4 your personal data and one or more credit reports into its
5 secure database -- meaning the company's database; provides
6 you with a login to access your case online and to access
7 certain informative content Lexington offers its clients;
8 collects information and instructions from you regarding
9 your particular circumstances and how you wish to provide;
10 analyzes your case; and prepares and sends one or more
11 credit repair communications on your behalf. And the credit
12 repair communications is what we were talking about, that go
13 to the bureaus and the furnishers. So that's what is done
14 before someone pays.

15 THE COURT: Or most of the cases. The analysis is
16 done by the telephone operator?

17 MR. WHITELEY: The telephone operator inputs the
18 data. They take the customer's data. And then as my
19 colleague, Mr. Bennett, was talking about earlier --

20 THE COURT: The machine does the analysis?

21 MR. WHITELEY: The algorithms have been developed
22 with the help of attorneys.

23 THE COURT: I understand that, but it's the
24 machine that makes the call.

25 MR. WHITELEY: The algorithm will take the

1 customer data and analyze it according to what real people
2 have told it to do, and then the communications get sent out
3 according to that.

4 THE COURT: But the communication is composed by
5 the machine?

6 MR. WHITELEY: So the letters are actually
7 originally drafted by a -- they are originally drafted and
8 reviewed by attorneys.

9 THE COURT: I understand that. But the call is
10 received by the telephone operator. The information is
11 received by the telephone operator. The input triggers the
12 machine to turn out a product that is sent in the name of
13 the customer to the credit bureau, calling their attention
14 to matters that are incorrect, or outdated, or should be
15 eliminated. At that point the creation of the particular
16 letter for a particular customer is the creature of the
17 machine and the algorithms that are set forth.

18 MR. WHITELEY: The final product that gets mailed
19 out, yes, it is.

20 THE COURT: It's sent out, and it's sent back, if
21 there's a response, not to the company but to the person?

22 MR. WHITELEY: Yes, the individual client.

23 THE COURT: Okay.

24 MR. WHITELEY: There's a few reasons that it goes
25 back to the client. If they want to leave Lexington Law or

1 CreditRepair.com for whatever reason, that way it ensures
2 that they've got everything they need. They don't need to
3 come to us asking for documents because they didn't get
4 their response back directly. That's part of why it's --
5 you know, it's designed to facilitate a conversation between
6 the individual client and their creditor.

7 THE COURT: And when you're talking to a client
8 with more than one problem, you set out over a period of
9 months that you'll do two replies the first month, or three,
10 or whatever the number is, a number of replies the second
11 month, a number of replies the third month?

12 MR. WHITELEY: Yes. So this is also set out in
13 the engagement agreement on the next page that lays out what
14 they call credit repair communications will be sent out
15 during which time intervals. This is all assuming that they
16 stay.

17 THE COURT: Is there, between the first letter
18 that goes out and the second month missives that are sent,
19 any communication at all between the client and the
20 telephone operator?

21 MR. WHITELEY: The clients often call in during
22 that time. And we are sending out notices to the client
23 when a letter or a challenge is sent to the Bureau during
24 that time. Every time that happens they get a notification
25 from the portal. And they're always -- you know, we have

1 hundreds of paralegals taking calls.

2 THE COURT: In your contract do you say we're
3 going to send two letters the second month and three letters
4 the third month, four letters the fourth month?

5 MR. WHITELEY: The specifics of that is set out in
6 the engagement agreement.

7 THE COURT: In each contract?

8 MR. WHITELEY: Yes.

9 THE COURT: That's what you've promised to do?

10 MR. WHITELEY: Those are the efforts we've agreed
11 to do on behalf of the client.

12 THE COURT: But you're interested in collecting
13 for what you've done?

14 MR. WHITELEY: Yes. We do bill in arrears. We
15 only can collect for what we've already done.

16 THE COURT: We talk about billing, but you don't
17 send a formal bill, do you?

18 MR. WHITELEY: I think it comes through -- I'm not
19 sure what you mean by formal bill. They do get
20 notification --

21 THE COURT: How do I know that you're going to
22 call on my credit card or call on my bank?

23 MR. WHITELEY: The clients agree to be billed
24 monthly automatically.

25 THE COURT: By billing automatically, what do you

1 do?

2 MR. WHITELEY: We charge whatever method of
3 payment the customer has provided.

4 THE COURT: Okay. And I have provided you with a
5 credit card. So on the first of the month, if I've done
6 something the second month, I draw down or I make use of the
7 credit card?

8 MR. WHITELEY: So you're saying that you did work
9 on month two, then you're going to billing in month three,
10 you're going to charge the credit card automatically? Did I
11 get that right?

12 THE COURT: No. No. You suggest, counsel
13 suggests that you do something in month two, purportedly to
14 justify your charge. And at the end of the month you make
15 use of the credit card automatically.

16 MR. WHITELEY: At the end of month two?

17 THE COURT: At the end of the month two, because
18 you've done something, supposedly.

19 MR. WHITELEY: Yes.

20 THE COURT: And in that month two, as a matter of
21 practice, do you talk again at all with the client?

22 MR. WHITELEY: If they call in, yes. And we also
23 send notifications of the work that we have done, every time
24 we're sending out the letters of the challenges.

25 THE COURT: We sent out two letters and we're

1 going to charge you for it, or we've sent out three letters,
2 but you've promised to send them out over a period of time?

3 MR. WHITELEY: If they are still engaged, yes, we
4 agree to do it on a certain level.

5 THE COURT: If they pay you?

6 MR. WHITELEY: Yes.

7 MR. BENNETT: Sorry. I've stuck my colleague,
8 Mr. Whiteley, with explaining my prior answers to the Court.
9 So if I could just pick up for a moment here.

10 I think there are a couple of things that are
11 important to keep in mind. The first is that in the
12 engagement agreement, it's set out it's a month by month
13 agreement. So there's a --

14 THE COURT: But you look towards months in the
15 future.

16 MR. BENNETT: Potentially, if the client stays.

17 So the part of the engagement agreement that
18 Mr. Whiteley read to you is about the first month. And then
19 there's a paragraph that says subsequently, and it describes
20 what is done in later months if the client signs up.

21 THE COURT: Well, I've signed up. I'm interested
22 in your services. You told me you're only going to send a
23 couple of letters the first month. And you've told me that
24 you'll send three letters the second month.

25 MR. BENNETT: Not quite, Your Honor. What we said

1 is we'll send a few letters the first month. And if you
2 continue with the service, it starts another service
3 interval. And in the second service interval, if you're
4 still engaged, we'll send subsequent communications.

5 THE COURT: Okay. How do I indicate my
6 willingness to be engaged?

7 MR. BENNETT: In the engagement agreement it sets
8 out how you can opt out of the system.

9 THE COURT: Well, that's opting out. I'm talking
10 about opting in.

11 MR. BENNETT: By continuing to work with us and
12 pay, and this is what we talk about how people sometimes
13 decide they're going to charge back their last payment
14 because they might have missed their opportunity, because
15 they can call us, they can email, they can write a letter to
16 cancel at any time. Sometimes they don't do that. And so
17 they decide, after we've done a month of service, they
18 decide, you know what, I don't want that anymore.

19 THE COURT: I understand that. But it's up to
20 them to opt out.

21 MR. BENNETT: It is up to them to tell us.

22 THE COURT: If they don't tell you, you assume
23 that your service is continuing?

24 MR. BENNETT: Well, they're told all along --
25 first of all, they agree on the day on which they'll be

1 billed. It's usually some days after the end of the service
2 interval. You'll see in the client files there's some
3 discussion about that, and sometimes they change the date.

4 THE COURT: But if they don't opt out, they get
5 charged?

6 MR. BENNETT: If they don't affirmatively opt out
7 and they continue to use the service, they get charged.

8 THE COURT: What do you mean by continue to use
9 the service?

10 MR. BENNETT: Continue to keep engaged with us.
11 So they continue to be our clients. They continue to get
12 the benefit of the intervention.

13 THE COURT: But I haven't opted out. I don't want
14 to opt out. I want to continue the service. What have you
15 promised to do in the second month?

16 MR. BENNETT: So it's set forth in the engagement
17 agreement. After the paragraph that Mr. Whiteley just read,
18 it reads, subsequently, Lexington typically performs one or
19 more of the following, ongoing, and periodic services as
20 appropriate in its judgment and discretion. It receives and
21 reviews bureau and furnisher correspondence sent to us
22 directly or by you. Collects and reviews updated
23 information and instruction from you regarding your
24 circumstances, goals, and case. Monitors and analyzes your
25 case. Provides you with status updates regarding your case.

1 And prepares and sends one or more additional credit repair
2 communications on your behalf. And it goes on. Regardless
3 of the service level, Lexington uses its judgment and
4 discretion to determine the content, number, and frequency
5 of the credit repair communications.

6 So that's what happens downstream each service
7 interval if the client stays engaged. And then once that
8 has been done, the client is billed. And they receive a
9 notification we're going to bill your credit card that
10 you've given us, or your debit card.

11 THE COURT: What does the notice say?

12 MR. BENNETT: I don't have one here, Your Honor.
13 We have client files that should reflect that. If not, I
14 can provide the Court with one.

15 And the client, of course, throughout the
16 engagement, in perpetuity, has access to and has a copy of
17 the engagement agreement which spells out -- and then it
18 goes on, it talks about the various service levels that have
19 been discussed. It talks about on average how many
20 communications each of those service levels generates.

21 THE COURT: But it's your discretion to furnish
22 them if you want to?

23 MR. BENNETT: It's our discretion to furnish them
24 if it's in the best interest of the client to pace them in a
25 certain way. This goes back to the work product that went

1 into devising how to pace them. It's a little bit like
2 dealing with motions practice before the Court. Do we want
3 to file all of our motions to compel on the same day or do
4 we think the Court would be more receptive seeing those
5 motions to compel.

6 THE COURT: It's your discretion under the terms
7 of the contract, your judgment that makes the call?

8 MR. BENNETT: It is. It is. And if we don't and
9 if in our judgment it's time for this client to change their
10 service level or to terminate with the repair services and
11 go to the monitoring services, then we advise the client of
12 that, and that's what happens.

13 Which actually raises the point, to go back just
14 for a moment to Dr. Frederick. What the government said
15 about him considering the monitoring products when he did
16 the comparison of first and last credit score, many clients
17 go from a repair product to a long-term monitoring product,
18 and it's undisputed -- the government I don't think will
19 dispute this -- those clients who may have spent months or
20 even a year on a monitoring product, that is not sending out
21 dispute letters, those were baked into his analysis. And so
22 because their credit score may not change, or it might even
23 go down under a monitoring product, because we're not doing
24 interventions, that gets baked into Dr. Frederick's
25 analysis.

1 But at any rate, the discretion of the attorneys
2 is baked into how the data that is collected by the
3 Teleservices rep is used to determine the content, the
4 recipient, the pacing of the letters that go out, not just
5 in the first service interval, but then as the case
6 develops. And as responses come in and things are
7 successful or not -- and if we go through the first round
8 and some of those items fall off and some do not, and the
9 client stays engaged, then there are subsequent rounds
10 where, again, with the discretion that's been built into the
11 algorithm, or because the client has talked to a
12 paralegal -- and just keeping in mind, Your Honor, that the
13 Teleservices rep, the employee of Progrexion working as an
14 agent for Lexington Law, that's only the first call. Every
15 communication after that is a communication with a Lexington
16 Law employee, a paralegal, or an attorney. Teleservices is
17 only involved at the outset.

18 THE COURT: Whose discretion are we talking about?
19 Your contract says your discretion.

20 MR. BENNETT: So I'm reading from the Lexington
21 Law engagement agreement. It's the discretion of the
22 Lexington Law attorneys as to how we pursue -- now they have
23 worked with --

24 THE COURT: No. They don't control what goes out
25 the second month, do they?

1 MR. BENNETT: They control it in the sense that
2 they educated the algorithm with the advice of experts on
3 credit repair and credit reporting, which helps them
4 understand what are the items that are mostly to come off
5 and what items have the most impact. It's the attorneys who
6 authorize all of that.

7 THE COURT: They don't oversee that, do they, at
8 all?

9 MR. BENNETT: They do. They do. And if they
10 decide -- if a new clerk -- here's a good example,
11 Your Honor.

12 THE COURT: We're not connecting. You've got
13 hundreds or thousands of clients.

14 MR. BENNETT: Yes, Your Honor.

15 THE COURT: And the telephone operator does the
16 input to begin with.

17 MR. BENNETT: That's correct.

18 THE COURT: And the machine creates and sends the
19 letters in the name of the client, with the address of the
20 client.

21 MR. BENNETT: And not to quibble over semantics,
22 Your Honor, but the word create is what is causing me
23 problems here, because the letters -- 23,000 letters were
24 drafted and edited by the attorneys, at the attorneys'
25 discretion. They created the letters.

1 THE COURT: But before my client ever came on
2 board?

3 MR. BENNETT: Correct.

4 THE COURT: You've got sample letters. So what?
5 How do they fit in with my particular problem? The
6 telephone operator does the input and the machine does the
7 selection.

8 MR. BENNETT: How they interact with your problem,
9 it's a couple of ways. And I shouldn't have been so quick
10 to say the letters were drafted before you showed up because
11 the letters are changed over time, and I'll give you an
12 example, Your Honor.

13 When the pandemic hit and there became new avenues
14 of relief available to people with credit issues, the
15 attorneys got together and drafted a new letter. That went
16 into the letter bank. When laws change, like laws to
17 protect servicemen, or laws protecting people who have been
18 through divorce, those kinds of things happen, the letters
19 are changed.

20 What the attorneys have developed over time, and
21 we're talking about literally millions of touches with
22 clients over two decades, that these cases -- and recalling
23 again that Lexington Law essentially does one thing as a law
24 firm -- the cases fall into categories much in the way --

25 THE COURT: The first letter that goes out is the

1 result of the input received by the telephone operator?

2 MR. BENNETT: That's correct.

3 THE COURT: Okay. Of those clients that start,
4 what percentage ever talk to a lawyer?

5 MR. BENNETT: A small percentage.

6 THE COURT: A very small percentage.

7 MR. BENNETT: A very small percentage.

8 Every single one who wants to talk to a lawyer
9 talks to a lawyer, but very few want to because they have
10 outsourced this work. They've chosen to do the most
11 efficient and convenient thing for themselves. Many
12 consumers don't choose to do this. They choose to do it on
13 their own or not address it at all. But the ones who choose
14 to engage us, they make a bunch of choices from there on.

15 They choose to go on the website and change their
16 profile. They choose to tell us to either challenge or not
17 challenge items as they remember that it might be theirs, or
18 they have some other thing happen. Some of them, as
19 Your Honor can imagine, call all the time and talk to the
20 paralegal for long periods of time. Some of them never call
21 and talk to the paralegals. It's up to them.

22 If we have an issue, we reach out to them. We'll
23 call them, or we'll email them, or both, to reach out if we
24 have an issue that we see with them. But it's up to -- it's
25 completely up to the client. And that's how Lexington Law

1 is able to provide services to so many people.

2 If it was required, which it's not by any bar, but
3 if it were required for us to talk physically attorney to
4 client in every engagement, we couldn't provide this service
5 for \$119 a month. And this is an issue that has been, as
6 you can imagine, studied deeply by counsel within and
7 outside the company to make sure we stay on the right side.

8 Now it's interesting, Your Honor, this is an issue
9 that I -- I can tell Your Honor has been a lawyer for a long
10 time, I've been a lawyer, and when I first saw this, I was
11 very interested in how this complies with the normal rules
12 of lawyering.

13 I think it's fascinating where the government has
14 investigated for all these years, and they've drafted a
15 complaint, they've now drafted a second complaint, they had
16 CIDs, they had an army of their internal experts and
17 internal lawyers look at this, the question of whether we
18 provide legal services is not part of their allegations in
19 this case. It's not because they have come to the same
20 conclusion I think that we have come to and others who have
21 looked at this have come to, which is it's unconventional to
22 be sure, but there's no question that Lexington Law is
23 providing legal services to its clients.

24 THE COURT: That they have yet to even get
25 acquainted with.

1 MR. BENNETT: They what, Your Honor?

2 THE COURT: They've never met.

3 MR. BENNETT: They may never have met. They
4 probably have never met.

5 It is very different than the functioning of many
6 law firms but not all law firms. And courts that have
7 looked at it -- there's a case actually on point, not for
8 Lexington Law so much, but the LegalZoom case out of the
9 Western District of Missouri. It's a 2011 case, and it's
10 802 F.Supp.2d 1053, and it looks at whether provisions of
11 these kinds of remote legal services was, in fact, legal
12 services, and found that it was. That was I think in the
13 discovery context.

14 But it's the same notion that -- our law firm
15 operates very differently than Lexington Law. We have a
16 shiny office. We've got a lot of lawyers there. We have
17 very few clients to the ratio of lawyers to clients. We
18 charge our clients a little bit more than \$119 a month.
19 They have chosen -- and John Heath will testify about this,
20 because of his background in working in legal aid where he
21 worked with the most indigent Utahns to help them with their
22 problems, and seeing how many people in the State of Utah
23 and also around the country fall in the doughnut hole
24 between being poor enough for legal aid and being wealthy
25 enough to hire a law firm that has a one client to one

1 lawyer ratio, and it was trying to fill that doughnut hole
2 that developed the business model of Lexington Law.

3 And so all the use of technology, the leveraging
4 of outsourcing, using the Teleservices reps, the letter
5 bank, drafting 23,000 letters over two decades, but not
6 doing it every day, and not doing it for every individual
7 client because, you know, when you've done this long enough,
8 the cases fall into just a handful of categories.

9 You've got a lot of divorced people. You've got a
10 lot of people who were military. You've got people with
11 medical bills. You've got people who might qualify under
12 the -- the new letters go out for people who might qualify
13 for COVID related relief. You've got people who fall into
14 those categories.

15 So you can develop, through an algorithm, a way to
16 match this client who calls and says I got divorced and my
17 deadbeat husband ran up my credit card bill, and now I've
18 got all these items on my credit report that belong to him,
19 and I need some help. You get enough of those -- you get a
20 couple of letters, forms of letters that you know I can send
21 this out, and if I send one this month and I wait six weeks
22 later and send another one to Bank of America for the credit
23 card, or whoever it might be, that that's the most likely
24 way to be successful in getting this bank to say, you know
25 what, it's really not fair that we're hitting that person's

1 credit.

2 Same thing with military members. People call in
3 and say, you know, I just got back from Afghanistan. Sorry
4 I couldn't pay my bills. I was in Kandahar. I need some
5 help telling these people to stop hitting my credit report
6 because it's killing me. And they have letters for that
7 that invoke the Servicemen's Relief Act.

8 There are literally a handful of ways this comes
9 up, each case being unique in its own way, but it's enough
10 where you can have 23,000 letters in your letter bank, and
11 you ask the right questions of people when they call, and
12 get the right direction from them, that you can provide this
13 service. And, again, if they have questions about it, they
14 call and talk to a paralegal, they call and talk to an
15 attorney, and they can have those questions answered. But
16 that's the business model.

17 And what the government wants to do is take away
18 the opportunity of these folks to come in, for a little over
19 100 bucks a month, and have somebody stand up to the credit
20 bureaus, and to the debt collectors, and to the banks to
21 make sure that these people get treated fairly.

22 THE COURT: You don't comply with the reg, do you?

23 MR. BENNETT: With which reg?

24 THE COURT: The reg we've been talking about in
25 Count 1.

1 MR. BENNETT: We absolutely comply, Your Honor.
2 We comply with the first Romanette i, because we describe
3 what we're going to do in a service interval. It's defined
4 in the contract. We provide those services and we bill when
5 they're complete.

6 And on Count 2, we don't promise a result.

7 THE COURT: Do you furnish a second credit report
8 once changes have been made?

9 MR. BENNETT: We update people on the status of
10 their credit.

11 I can find out for Your Honor whether we actually
12 pull a second credit report and send it to the client. If
13 we made promises, we would do that. We may do it under some
14 of our service intervals. I don't know standing here today.
15 But the reason we don't make promises are a couple fold.

16 THE COURT: Well, you promised to write some
17 letters.

18 MR. BENNETT: That's not a result. That's a
19 service. That's under Romanette i. We promise to write
20 letters and we only bill when the letters are sent, or other
21 services are provided. So that's Romanette i.

22 Romanette ii is about results. And this is why,
23 if you look back through 25 years --

24 THE COURT: Well, you write letters to expect a
25 result. You write letters to cause the credit bureau to

1 change.

2 MR. BENNETT: And we are assiduously careful with
3 our clients in the engagement agreement, Your Honor.

4 THE COURT: Well, I think it's a wonderful
5 engagement letter. It's really complete.

6 MR. BENNETT: Well, Your Honor, the very next
7 paragraph after the description of services reads as
8 follows: Lexington cannot guarantee and you are not paying
9 for a particular credit report outcome or result. You are
10 paying only for Lexington Law's efforts on your behalf. The
11 bureaus or furnishers may not respond to initial or
12 subsequent credit repair communications and ultimately may
13 decide not to remove items from your consumer credit file
14 despite Lexington's efforts.

15 That is the opposite of pledging or promising a
16 result. And we do that because we don't want to be caught
17 in the trap of giving people false hope that if you sign up
18 with us, we're going to get something taken off your report
19 in a way that would make us covered by the TSR.

20 THE COURT: We're going to write a letter in the
21 hope that something is changed on your report. You don't
22 guarantee it.

23 MR. BENNETT: And we make sure that there is no
24 expectation on behalf of the client that that will happen.
25 We couldn't be clearer --

1 THE COURT: Why isn't there an expectation?
2 What's wrong with an expectation? What kind of services are
3 you selling if you're not selling an expectation?

4 MR. BENNETT: Well, we could hardly be clearer
5 that we're not selling an expectation. We don't want the
6 client to think, oh, I'm paying \$120 a month. Well,
7 certainly my credit score will go up.

8 THE COURT: No. No. No. But you're
9 advertisements, your websites indicate that somebody expects
10 a change if one asks for an incorrect item to be eliminated.

11 MR. BENNETT: I don't think anyone can fairly read
12 our literature, look at our engagement letter, listen to our
13 scripts and expect their situation to --

14 THE COURT: Why write a letter if you don't expect
15 some action?

16 MR. BENNETT: Because you want the opportunity for
17 it to improve. It won't improve on its own. So let's take
18 some action and maybe it will improve.

19 And that's what is so important about the
20 distinction we draw between the efforts we will take on your
21 behalf. We will do these things for you. They may not have
22 any result, but it opens up the opportunity that if somebody
23 has been spreading false information about you on your
24 credit report, or unfairly reporting something on your
25 credit report, that that might come off.

1 The CFPB has studied this and they admit that
2 there are these errors. One-fifth of us -- one-fifth of
3 us --

4 THE COURT: Lots of errors, I understand that.

5 MR. BENNETT: And half of the people who know they
6 have an error but do this on their own give up, because they
7 don't have time. And as Mr. Whiteley said, the whole system
8 is set up against the consumer. It bogs them down. They
9 get form letter back after form letter back. They need to
10 have somebody help them if they want to get it done.

11 So they sign up not expecting that it will
12 improve. They hope, I'm sure. Everybody hopes that we're
13 treated fairly. They sign up to have the opportunity for it
14 to maybe, hopefully get fixed. We try to be very clear
15 about that.

16 THE COURT: You want to change something.

17 MR. BENNETT: Like every business that does well,
18 that has a 20-year history, we rely largely on repeat
19 customers. A third of our clients at any given time are
20 people who have used the service. It either helped them, or
21 satisfied them at least, that we had done what we could.
22 They went on with their lives, and then decided to come back
23 at some other time and engage us again.

24 Some of the handpicked -- I'll avoid using the
25 word cherry-picked -- but the handpicked consumers that the

1 government wants to say were misled are people who signed up
2 again and again for CreditRepair.com and/or Lexington Law,
3 because they apparently were satisfied.

4 And so we want people to use our service because
5 they need it, they want it, and they can afford it. And
6 when they're done, we want them to feel like they got a fair
7 shake, because we know they're going to come back. That's
8 how we've stayed in business for two and a half decades.

9 So this notion that you could go in and stay in
10 business that long promising somebody through bait and
11 switch, or any other kind of ad, that you're going to get
12 this result, and then not provide that result, we just
13 wouldn't be here today, this long into the life of the
14 company, if we were doing that.

15 And you can look at the 25-year history of the
16 TSR, and look how it's been enforced. It's only been
17 enforced -- and the government said their two best cases are
18 the Commonwealth Equity case and Prime Marketing. And in
19 both those cases -- so different than this case -- there
20 were express promises of improvements in your credit score.
21 I think in Prime Marketing the allegation was you get a
22 hundred point increase no matter what. In Commonwealth,
23 we'll fix unlimited negative items.

24 And the reasons those kinds of promises are really
25 critical, Your Honor, is that going back to the language of

1 the TSR, the promise isn't some ephemeral result, how that
2 may be defined. It has to be -- for the second Romanette to
3 kick in, in the TSR, the promised result Romanette, for that
4 to kick in, the promised result has to be something that's
5 reflected on a credit report. Otherwise the provision makes
6 no sense at all. So you have to be promising this will
7 happen on your credit report, and it will be reflected six
8 months hence.

9 So the promise of sending out letters or the hope
10 that something will change, that's not the kind of promise
11 that is addressed in Romanette ii. It's the kind of
12 promise, in Prime Marketing and Commonwealth Equity, where
13 there was a promise of a change on your credit report.

14 Lexington Law has been known to the FTC since --
15 it's basically the same time that the TSR was put into
16 effect, in the late '90s. Our practices, they have evolved
17 over time, but they are basically the same structure of
18 billing and not promising results.

19 We had a case in Tennessee that involved the FTC.
20 They were deeply involved in that case. They intervened in
21 that case. They are aware of how we do business. They are
22 the agency that --

23 THE COURT: Is that the case where you agreed that
24 you were not selling legal services?

25 MR. BENNETT: No. The Tennessee case was one

1 where we agreed that we would bill as in the way we do and
2 we wouldn't promise people results.

3 THE COURT: I thought that was the -- you had a
4 case where you indicated, by stipulation, that you weren't
5 selling legal services.

6 MR. BENNETT: I think there was a discovery
7 dispute in South Carolina where counsel took the position
8 that we were not providing legal services and the Court held
9 the other way.

10 But, again, if the government thought legal
11 services should be in this case, they've had 11 years to put
12 it in the case. They've had complaints now. The question
13 of legal services is not part of the allegations of this
14 case.

15 But going back to the language of the TSR, if we
16 were violating the TSR, we've been doing it openly and
17 notoriously for 25 years with the FTC's full knowledge.
18 We've been doing it during the entire life of the CFPB. And
19 here we are in 2022, and for the first time the CFPB and for
20 the no time the FTC is trying to enforce this statute in a
21 new and novel way.

22 That's why this Court will be the first court of
23 any court in America to give this statute -- or this
24 regulation the reading that the government wants it to have
25 where they're going to change the meaning of promised result

1 to mean some sort of implied promise, not an express
2 promise, like in all the other cases, or some sort of hope
3 for a result. That would be shockingly novel, it would
4 upset the entire credit repair system in America for the
5 last two decades, and it would --

6 THE COURT: You argue that your provision does not
7 come within the regulation.

8 MR. BENNETT: We come within the regulation and we
9 comply with the regulation by not making promised results.
10 If we made promised results, I wouldn't be here arguing that
11 we don't need to wait six months until after those results
12 are obtained.

13 THE COURT: And so you comply with the regulation?

14 MR. BENNETT: Because we don't make promised
15 results. If we promised results, Romanette ii would require
16 us to do a bunch of other things. We comply with the
17 regulation to the extent it applies. We don't make promised
18 results. We do promise to provide services, and we've laid
19 out in the engagement agreement to provide those services,
20 and bill only after they have been provided.

21 THE COURT: You say you're complying with the reg?

22 MR. BENNETT: We are complying with the reg to the
23 extent it applies to us.

24 THE COURT: Okay. Okay.

25 One matter of curiosity. Who owns the 23,000

1 letters?

2 MR. BENNETT: That's an intellectual property
3 question, I believe, Your Honor. I don't know.

4 Obviously the letters that are sent out on behalf
5 of clients become part of a client file. So the client has
6 control over those. The letters that are in the letter
7 bank --

8 THE COURT: You indicate you've got 23,000
9 exemplars that provide a resource for the telephone operator
10 after the input of the machine to make appropriate
11 selections. I'm just curious who owns the 23,000 letters.

12 MR. BENNETT: The letters are certainly controlled
13 by Lexington Law. I don't know if they're owned by an
14 individual or the law firm. I just don't know, Your Honor.
15 So I can check on that and get back to you. But they're
16 certainly controlled by Lexington Law.

17 THE COURT: Well, the trademark Lexington Law is
18 owned by Progrexion, isn't it?

19 MR. BENNETT: The trademark of Lexington Law is
20 owned by Progrexion and licensed pursuant to a license
21 agreement that's renewed from time to time.

22 THE COURT: Okay. But I was just curious as to
23 the resource that you suggest exists in response to the
24 input taken by the telephone operators. And that's just an
25 ongoing curiosity. Maybe you'll respond to that the next

1 time we get together.

2 MR. BENNETT: I will be prepared to respond to
3 that, Your Honor. I'm sorry I don't have it at hand here.

4 I will grant you, Your Honor, this is a
5 fascinating business model, and it's different than one that
6 I've practiced in for my career, probably different than
7 ones you've practiced in your career.

8 THE COURT: It's an interesting life. Okay.

9 MR. BENNETT: Would you like to talk more about
10 Dr. Stango?

11 THE COURT: Why is Mr. Stango worth listening to?

12 MR. WHITELEY: Yes, Your Honor.

13 Getting back to Dr. Stango, as I said before, he's
14 relevant because the Bureau wants to gloss over its initial
15 burden of showing that net revenues is the appropriate
16 amount of restitution.

17 THE COURT: What do you say is the better
18 methodology?

19 MR. WHITELEY: We think for Count 1, what
20 Dr. Stango says is that because there's not any deception
21 alleged in Count 1, what they're saying is we should have
22 waited to bill. We should have waited six months.

23 THE COURT: That's their argument, among others,
24 sure.

25 MR. WHITELEY: So it's not saying that these

1 customers should never have paid us. It's saying that they
2 should have paid us at a later date. And Dr. Stango's
3 testimony on this point is helpful because he gives us an
4 alternative way to measure that. He says, well, the harm to
5 the consumer in that case would be any interest forgone,
6 because, you know, if they didn't have to -- if they were
7 waiting to pay us, they could have been putting that money
8 to work and getting interest.

9 THE COURT: Well, what's the right measurement?
10 Does he tell us what the right measurement is?

11 MR. WHITELEY: He gives us one option of what the
12 right measurement should be.

13 THE COURT: What does he say it should be?

14 MR. WHITELEY: As to Count 1, he says it should be
15 calculated as forgone interest. He takes the -- sorry,
16 forgone interest. He says we take the money that would have
17 been paid over that short six-month period and instead use
18 it in a safe investment, a T-bill, and that's the
19 measurement of what they actually lost, because, as you
20 said, it's not that this never should have been paid to the
21 defendant. It's that they should have waited to pay. So
22 that's what the loss of harm is.

23 THE COURT: Interest for six months?

24 MR. WHITELEY: Yes.

25 THE COURT: Okay. What else, anything?

1 MR. WHITELEY: Anything that he testifies --

2 THE COURT: This is a righteous measurement.

3 MR. WHITELEY: Well, another it could be is net
4 profits instead of net revenues. We've been talking a lot
5 about legal versus equitable restitution, but what the
6 government didn't talk about is why that matters.

7 THE COURT: Net profits by whom?

8 MR. WHITELEY: Net profits by the defendant
9 companies.

10 THE COURT: I'm sorry?

11 MR. WHITELEY: The defendants. Their net profits
12 instead of -- instead of the total amount they've brought
13 in, their net profits minus --

14 THE COURT: Well, the net profits of Progrexion
15 are different than the profits of Heath.

16 MR. WHITELEY: Yes. It would be net profits of
17 all defendants.

18 THE COURT: All of them?

19 MR. WHITELEY: Yes.

20 THE COURT: Okay. Some are more efficient than
21 others?

22 MR. WHITELEY: Yes. So this is different
23 depending on Count 1 versus Counts 2 through 5.

24 But the reason that this matters is that the
25 Supreme Court has recently said that equitable remedies

1 against a defendant company like this should be limited to
2 net profits, not net revenues, as the government has
3 posited. That was first decided in the case SEC v. Renew in
4 2020. And since then some circuit courts have also applied
5 this in the context of the CFPA.

6 THE COURT: Anything else?

7 MR. WHITELEY: As to Dr. Stango's opinions?

8 THE COURT: Why is he helpful to us? That's all.

9 MR. WHITELEY: Well, there are --

10 THE COURT: Provided alternatives he apparently
11 has.

12 MR. WHITELEY: Yes. So going to Counts 2 through
13 5, he also points out why the Bureau can't meet their
14 initial burden as to showing why their proposed measure of
15 restitution is appropriate. And he talks about a few
16 different ways that can better measure restitution because
17 the Bureau just wants to take whatever the consumer paid.
18 They assume that the consumer didn't receive anything of
19 value in response to what they paid.

20 But our position is consumers got what they paid
21 for. Our services are valuable. They received the efforts
22 that we agreed to do in the engagement agreement. And they
23 also received other things like education on credit repair,
24 which all have value.

25 THE COURT: Well, anything else?

1 MR. WHITELEY: Those are the chief opinions that
2 he talks about through Count 1 and Counts 2 through 5.

3 I would like to talk a little bit more on the
4 legal versus equitable distinction, if the Court would
5 allow.

6 THE COURT: Well, history is a wonderful teacher.

7 MR. WHITELEY: And yes, restitution has
8 historically been considered an equitable remedy.

9 And it was interesting listening to the government
10 come up here and say that they're not actually tracing any
11 money when the parties have done a considerable amount of
12 discovery to figure out how much consumers paid in this
13 case. We've produced lots of spreadsheets back and forth.

14 THE COURT: There's a lot of money, a lot of money
15 involved.

16 MR. WHITELEY: Yes. And we agree that it is too
17 much, and the Bureau is --

18 THE COURT: Too much for experts.

19 MR. WHITELEY: Yes. But that just shows that they
20 actually are doing -- they are seeking specific funds here.
21 They are seeking what consumers paid.

22 THE COURT: They say yes, pay us. We want to make
23 it available to those who supposedly have been taken
24 advantage of.

25 MR. WHITELEY: Sorry. I missed that.

1 THE COURT: Yeah. We want to collect for those
2 who have been taken advantage of. That's what their pitch
3 is.

4 MR. WHITELEY: Yes. And that fails to meet their
5 burden of showing why returning a total amount paid is
6 appropriate because they fail to account --

7 THE COURT: You say it ought to be cut way down,
8 for various reasons. I understand that. Okay.

9 Well, I don't know what you pay Mr. Victor Stango.
10 Others that you've withdrawn are pretty high priced. But at
11 any rate thank you.

12 MR. WHITELEY: Thank you, Your Honor.

13 MS. HILMER: Your Honor, I'll just address a
14 couple of points and then I'm happy to take any questions.
15 I'm not inclined to get too into the discussion you just had
16 with Mr. Bennett, but obviously we're happy to.

17 THE COURT: I think that's a useful discussion.

18 MS. HILMER: Okay. And we'll be happy to respond
19 because there are certainly things that he has said that we
20 vehemently disagree with. But let me start with this
21 question of Dr. Stango since that's the matter before the
22 Court on this motion.

23 If defendants are positing a net profits
24 calculation instead of net revenues, first of all, we have
25 already laid out very clearly that that sort of a

1 calculation has not been accepted in these types of cases.

2 And I'll point out that the Cashcall decision is
3 post Liu. The Ninth Circuit, post Liu, is still saying
4 apply restitution in the form of gross revenues minus
5 refunds where appropriate.

6 Now the defendants say, well, the government
7 hasn't shown that restitution would be appropriate here.
8 Why wouldn't it be? This is the same kind of case where
9 restitution for consumers -- net refunds have been given to
10 consumers in the form of redress for decades, endorsed by
11 the Tenth Circuit in cases, and explained very clearly and
12 applied by the Ninth Circuit in a number of cases.

13 And a key point of this is that the Tenth Circuit
14 adopts the Ninth Circuit's principle from Figgie
15 International, that when the fraud is in the selling, as it
16 is here, then restitution is an appropriate relief, and
17 restitution should be calculated as the amount the consumer
18 paid minus refunds, with an option and a possibility of
19 allowing certain offsets, but the offsets have to be proven
20 by the defendants, and they haven't done that here.

21 As far as I can tell, all they've done here is
22 given you an interest calculation that you could possibly
23 add on top of the restitution, but they haven't given you
24 any basis to ignore all of this case law.

25 Anyway, Dr. Stango doesn't do a net profits

1 calculation. He doesn't do any calculation except for
2 here's the three-month T-bill. Yeah, well, if you find they
3 violated the law, the only thing that they should have to
4 pay back is the three-month T-bill rate, which is not a rate
5 that is available to any of these consumers.

6 There's no precedent whatsoever for limiting
7 consumer redress where there's been such a massive violation
8 of the law. I mean an ongoing violation of the law.
9 Your Honor, if they wanted to stop the bleeding, they could
10 do it today and fix their business model to conform to the
11 requirements of the regulation. But there has been
12 absolutely no case law that they can cite or that we found
13 that says, you know, all the consumers need to get back is
14 interest.

15 And we cited a couple of cases under other
16 provisions of the TSR, the debt relief provisions where
17 there's a similar payment delay that the FTC imposed. And
18 in those cases the net revenue calculation that we proposed
19 was also used. And the cases that do that, one is a CFPB
20 case called CFPB v. Morgan Drexen. We've cited this case in
21 our papers, in our motion and reply. And also a Sixth
22 Circuit decision called FTC vs. E.M.A. Both of those cases,
23 in a very similar setting, applied this calculus and
24 absolutely reject net profits. So I think it's important
25 that we just get that legal position straight.

1 I do just very briefly want to point out a couple
2 of things.

3 Mr. Bennett has spoken a lot about the engagement
4 agreements and how the engagement agreements have all these
5 disclosures, after the fact. Remember, these people are
6 being signed up on the phone and being asked to text, agree
7 on their phone while they're on the call with the person.
8 So there's no way that they are scrolling through all of
9 this documentation while they're sitting there. They're
10 being told scroll down, scroll down, scroll down, and then
11 hit agree. And you'll hear that on the calls.

12 But here's what the FTC said about 310.4(a)(2).
13 The FTC stated that it imposed delayed payment requirement
14 on credit repair services because there are no disclosures
15 that could effectively remedy the problems that arise from
16 telemarketing of those illusory services. The harm to
17 consumers could be averted only by specifying that the
18 seller's performance of these services must precede payment
19 by the consumer. Let me give you the cite. 67 Federal
20 Register 4492, page 4504, January 30th, 2002. And this is
21 also something that we have cited to you in our briefing.

22 It may also be instructive that Mr. DelPonti, the
23 expert that they kind of, sort of withdraw today, when he
24 was asked -- I asked him some questions in deposition
25 pertaining to his testimony about Lexington Law removals,

1 and this was the question I asked: How do you know that
2 Lexington Law caused all these removals? Here was his
3 answer: People are hiring them to perform the service. Do
4 I know that they caused every removal? No, but that's what
5 they are getting paid to do. That was their expert who said
6 that.

7 So I think it's important for the Court -- the
8 Court is asking very good and penetrating questions about
9 what Lexington Law does and how they do things, and we would
10 be prepared to address that in more detail if the Court
11 wants. I think it's very significant that when they sign
12 people up for these subscription services and they know the
13 people have ten or more negative items, they know they're
14 not providing that in a month. They know it's going to take
15 many months. They often tell people be patient. This is
16 going to take months. At a minimum, they say when we send
17 out the first letters, it's going to be 30 to 45 days before
18 you hear.

19 So it's not a one-month service interval. The
20 expectation is that the person signs up and stays in until
21 the negative items get removed or they just decide to quit.
22 They get fed up. Maybe they got what they wanted, whatever.
23 They leave.

24 So there is no basis for saying that the fact that
25 they bill these people monthly, automatically, without any

1 other interaction by the individuals, constitutes
2 satisfaction of the first requirement, that the time frame
3 in which the seller has represented all of the goods -- not
4 some of the goods, all of the goods or services will be
5 provided to that person has expired.

6 That's not happening in a month. They don't tell
7 people it's going to be a month. They do their revenue
8 projections on a break-even basis. Their goal is to keep
9 people in for at least two and a half months in order to
10 break even on them. So this is not a month to month
11 situation where it's like some new contract every single
12 month. It's an ongoing service, and the representation to
13 these folks who are signing up for it is I've got ten
14 negative items on my credit report, you're telling me I can
15 only get four letters a month. So do the math. That's more
16 than a month. That's several months. And if they have more
17 negative items than that, as many do, one can do the math.
18 If they are only going to get four letters out a month, it's
19 going to take many months.

20 And the service interval, whatever the billing
21 interval may be, that does not satisfy the requirements of
22 310.4(a)(2) Romanette i, the time frame in which the seller
23 has represented all of the goods or services will be
24 provided to that person has expired. They don't do that.
25 They never tell people when it's going to end, because if

1 they did, people would be asking them, you know, why am I
2 still paying you after this time. They don't do that. So I
3 think it's important for the Court to hear that.

4 Going back to Dr. Stango, we don't see any reason
5 for him to come into this case. He has absolutely nothing
6 to offer. He has no evidence about any issue that's
7 relevant to liability or damages, and, Your Honor, we would
8 ask that he be excluded on that basis.

9 Very quickly, as a housekeeping matter,
10 Your Honor, I would point out that this discussion of the
11 Cashcall case and all of the restitution cases was the
12 subject of a surreply by the defendants, a surreply
13 concerning Dr. Stango, and the Bureau sought leave to file a
14 response to that, a sur-surreply. I don't believe the Court
15 has ruled on that and we just wanted to make sure that the
16 Court was aware of it. That document is document 436.

17 So we would very much appreciate if the Court
18 would allow us to file that sur-surreply on the record so
19 the Court will have the benefit of both parties' discussions
20 of the implications of the Ninth Circuit Cashcall decision
21 for relief in this case.

22 Thank you so much, Your Honor.

23 THE COURT: Okay. Where does Frederick reside?

24 MS. HILMER: He's in New Haven.

25 THE COURT: New Haven at Yale?

1 MS. HILMER: Yes.

2 THE COURT: Okay. I'm hesitant to deal with
3 Mr. Frederick without hearing from Mr. Frederick. And I'm
4 wondering when you could present him so that I could listen
5 to your proffer from his mouth rather than
6 characterizations. I'm uncomfortable with dealing with the
7 record that exists at this point.

8 MS. HILMER: Your Honor, we can certainly get in
9 touch with Dr. Frederick, and, you know, determine what his
10 schedule is. I don't know whether he has classes that he's
11 teaching in September, but we can certainly get --

12 THE COURT: Hopefully before pretrial, which is
13 currently set on the 20th and 21st of September. But if we
14 could get a date, I think it's wise if we all listen to what
15 he has to say from the witness stand as a proffer, with an
16 opportunity for cross-examination, to see if he's worth
17 listening to, and get that determination made before we ever
18 get to a jury if we get to a jury.

19 Would you be in a position to call him tonight,
20 for example?

21 MS. HILMER: We will -- he's going to be two hours
22 ahead. So we will certainly get in touch with him
23 immediately to determine his availability. And if we can
24 reach him tonight, we will report back to the Court tomorrow
25 when we are here in session.

1 THE COURT: Yes. Well, why don't I give you a
2 break and let you go home a little early, and we can
3 reassemble at ten o'clock tomorrow. By then we'll have an
4 opportunity, it would seem to me, to figure a time when we
5 can listen to him from the witness stand to see what the
6 proffer actually is, with opportunity for cross.

7 MS. HILMER: We're happy to accommodate the
8 Court's request. We'll do the best we can.

9 THE COURT: Let's do that. And I'll think
10 overnight on the other questions.

11 MR. BENNETT: Your Honor, could I have two
12 moments? I wanted to make sure that we weren't talking past
13 each other -- that I was not responding properly to your
14 question earlier about whether our experts are in our case
15 in chief or our rebuttal case. I just wanted to make sure
16 that the Court was clear that if the government calls
17 Dr. Frederick and Mr. Weinberg, that we intend to call
18 Mr. DelPonti, Dr. Maronick, Dr. Barnett.

19 THE COURT: I understand that. I thought it would
20 be helpful to you, as well as others, to hear what he has to
21 say directly.

22 MR. BENNETT: I completely agree with Your Honor
23 on that.

24 THE COURT: As far as the good Dr. Weinberg is
25 concerned, I don't see how he can be helpful to us at all.

1 I can't jump from his determinations to the suggestion that
2 it demonstrates the existence of misrepresentation. I think
3 your motion in reference to him is correct. I will grant
4 the motion.

5 I think Mr. Victor Stango is in the same position.
6 I don't think he's worth listening to at this point on the
7 subjects that he's talked about. So I'll grant the motion
8 in reference to Mr. Stango.

9 We'll grant the motion in reference to
10 Mr. Weinberg.

11 We'll see you tomorrow at 10:00 and we'll see if
12 we can get Mr. Frederick out here at a convenient date for
13 everybody to listen to what he has to say. He may or may
14 not. I can't quite understand what he's going through, the
15 various phases that he has in what he's presented to us.

16 So I will ask the prevailing parties to prepare a
17 little order, simple, in reference to Stango and in
18 reference to Weinberg. If you will do that and get it to me
19 within ten days, I would appreciate it.

20 MR. BENNETT: Thank you, Your Honor.

21 THE COURT: We'll be in recess until 10:00
22 tomorrow.

23 (Whereupon, the proceeding was continued to
24 Wednesday, August 10, 2020 at 10:00 a.m.)
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C E R T I F I C A T E

I hereby certify that the foregoing matter is
transcribed from the stenographic notes taken by me and is a
true and accurate transcription of the same.

PATTI WALKER, CSR-RPR-CP DATED: 8-16-2022
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